TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~980~~ 30

LAWRASON RIGGS, JR., SPECIAL GUARDIAN,
PETITIONER,

vs.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO,
BYRON CLARK, JR., AS EXECUTOR, ET AL.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1942.

CERTIORARI GRANTED MARCH 30, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 980

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vs.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., AS EXECUTOR, ET AL.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1942.

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[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO and BYRON CLARK, JR., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a construction of Said Will and for Instructions

GIOVANNI DEL DRAGO, Individually and MARCEL DEL DRAGO, Appellants,

BYRON CLARK, JR., as Executor, LAWRASON RIGGS, JR. and Harold W. Hastings, Special Guardians, Corn Exchange Bank Trust Co., as Trustee, Respondents

STATEMENT

This proceeding for the judicial Settlement of Executors accounts was commenced on January 31st, 1940, by filing the Executors petition and the issuance of a citation, returnable on March 15th, 1940. On March 22nd, 1940, Lawrason Riggs was appointed Special Guardian for five infants, children of Mario del Drago, resident in Italy. On March 20th, 1940, Harold W. Hastings was appointed Special Guardian for five other infants, children of Clemente del Drago, resident in Italy. The names of the individuals in each group are set forth in the Executors petition (page 26). Said Special Guardians had theretofore been designated to receive service of the citation, which was also served by publication and mailing.

[fol. 2] Clemente Francesco del Drago, son of Marcel del Drago, was born during the pendency of the proceeding. A supplemental citation issued to said infant, for whom Harold W. Hastings was designated to receive service on October 14th, 1940, and after such service and publication and mailing, was appointed Special Guardian. Citation was returnable December 3, 1940.

Giovanni del Drago, as Executor, appeared by Ludwig M. Wilson, attorney, and Byron Clark, Jr., as Executor by Grant, Clark & Fox, attorneys.

Giovanni del Drago, individually, appeared by Robert W. Maloney, attorney, and filed an answer and objections on April 11th, 1940.

Marcel del Drago appeared by William J. Donovan and David Teitelbaum, attorneys, and filed objections on April 12th, 1940.

The Corn Exchange Bank Trust Co., Trustee, appeared by Laughlin, Gerard, Halpin & Graham, attorneys, and filed objection on April 15th, 1940.

Guiseppe Vitagliano and Yorktown Building Corporation, claimants, appeared by Samuel R. Kurzman, attorney, and filed objections, July 24, 1940.

Lawrason Riggs, Special Guardian, filed reports on April 12th, 1940, and August 2nd, 1940.

Harold W. Hastings, Special Guardian, filed reports on April 16th, 1940, August 2nd, 1940, and December 12th, 1940.

The hearing commenced on June 25th, 1940. By affidavit verified July 8th, 1940, amending the original account, and by petition of the Executors, verified July 5th, 1940, praying for judicial settlement of a supplemental account, the accounting period was extended from October 31st, 1939, through June 15th, 1940. The hearing continued on October 14th, 1940.

[fol. 3] The Surrogate's decision was filed October 21st, 1940. Final decree was entered November 19th, 1940, and supplemental decree December 24th, 1940.

Notice of appeal from the original decree was filed on December 19th, 1940, and from original and supplemental decree on January 17, 1941.

Ludwig M. Wilson was substituted as attorney for Marcel del Drago in place and instead of William J. Donovan and David Teitelbaum, January 17th, 1941, and designated jointly with Robert W. Maloney, as attorney for Giovanni del Drago, on January 17th, 1941. There has been no change of parties or attorneys except as hereinbefore set forth.

A total of $299,726.21 has been paid for estate taxes, comprising $229,726.21 paid with the Federal, and $70,000.00 with the State return. No final determination of exact liability has yet been made.

The Executors have made partial distribution of the legacies by payment of $220,000 to Giovanni del Drago, on account of $300,000, and by payment of $147,521.88, on account of $200,000, into the trust, of which Marcel del Drago is life tenant.

After making the foregoing, and all payments, directed by the decree, the Executors had on hand a balance of $51,454.06, in cash, and other personal property of the inventory value of $136,909.42. The resulting total of $188,363.48 has been diminished by $5,000, which the Executors have paid to the residuary trustee, as a partial distribution of principal. It is also chargeable with the unexpended [fol. 4] cost of a permanent tomb, not exceeding $10,000 as authorized by the decree, and with any deficiency in estate taxes assessed on final determination.

Decedent's real estate, rehabilitated by the Executors at an expenditure of $123,019.72 was turned over to the residuary trust on January 1, 1940, as part of the residuary estate, passing under the 9th paragraph of the will. Out of the income, $6,194.78 was amortized up to January 1, 1941, so that the residuary trust has had a total of $11,194.78 in cash, inclusive of the $5,000 paid by the Executors as a partial distribution of principal in discharge of the residuary legacy.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO and BYRON CLARK, JR., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a Construction of Said Will and for Instructions

NOTICE OF APPEAL TO COURT OF APPEALS

Please Take Notice that Giovanni del Drago, in his capacity as an individual as distinguished from his capacity as executor of the above named decedent, and as her husband [fol. 5] and as a legatee named in her Will, and as a respondent cited to appear upon the judicial settlement of the account of the proceedings of the executors herein, and Marcel del Drago, a legatee named in said Will, and a respondent similarly cited to appear, hereby appeal pursuant to the provisions of Section 588 of the Civil Practice Act, Subdivision 3, to the Court of Appeals from those parts of the decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the Will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

. . . . . .

Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the [fol. 6] decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

and to the extent that the supplemental decree entered in the office of the clerk of the Surrogate's Court, New York County, on the 24th day of December, 1940, confirms the foregoing quoted parts of the decree entered November 19, 1940, said Giovanni del Drago and Marcel del Drago, the aforesaid appellants, also appeal from so much of such supplemental decree, dated December 24, 1940, reading as follows:

"It is Ordered, Adjudged and Decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further

Ordered, Adjudged and Decreed that all of the terms and provisions of said decree shall be binding upon Clemente Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree."

Dated, New York, January 17th, 1941.

Yours etc., Ludwig M. Wilson and Robert W. Maloney, Attorneys for Giovanni del Drago, Individually, Ludwig M. Wilson, Attorney for Marcel del Drago, Room 2404, 2 Lafayette Street, Borough of Manhattan, New York City.

[fol. 7] To: Clerk of the Surrogate's Court. Grant, Clark & Fox, Esqs., Attorneys for Petitioner Byron Clark, Jr., 270 Madison Avenue, New York City. Lawrason Riggs, Jr., Esq., Special Guardian, 120 Broadway, New York City. Harold W. Hastings, Esq., Special Guardian, 70 Pine Street, New York City. Laughlin, Gerard, Halpin & Graham, Esqs., Attorneys for Trustee, 40 Wall Street, New York City. Samuel R. Kurzman, Esq., Attorney for Guiseppe Vitagliano and Yorktown Building Corp., 505 Fifth Avenue, New York City.

[fol. 8] In Surrogate's Court, County of New York

Decree on Accounting, Dated November 19, 1940 Appealed From

Present: Honorable James A. Foley, Surrogate.

Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of the County and State of New York, having heretofore filed a petition, verified on the 31st day of January, 1940, praying that the account of their proceedings as such Executors be judicially settled, * * * and as to whether the Federal and New York Estate Taxes are to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law; and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in said estate, citing them to show cause before the said Surrogate, at his office in the County of New York, on the 15th day of March, 1940, at ten-thirty o'clock in the forenoon of that day, why the account of said Executors should not be judicially settled, and why the determination prayed for in said petition should not be had, and an order having been made herein directing that service of said citation be made upon such of the parties as may be non-residents of the State of New York; and the said citation having been returned with proof of the due service thereof on Frederick E. Grant, Paula Murray Coudert, Corn Exchange [fol. 9] Bank Trust Company, as Trustee under the Will of Josephine del Drago, deceased, Marcel del Drago, and on Francesco del Drago, Alessandro del Drago, Angela del

Drago (daughter of Clemente del Drago) Maria Milagros del Drago, Angela del Drago (daughter of Mario del Drago), infants over the age of fourteen years, and on Anna Maria del Drago, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, and on Lawrason Riggs, Jr., and Harold W. Hastings, the persons designated to receive said citation on behalf of said infants; and the Court having obtained jurisdiction of all necessary and proper parties to this proceeding;

And the said Executor, Giovanni del Drago, having appeared on the return day of said citation, by his attorney, Ludwig M. Wilson, and the said Executor, Byron Clark, Jr., having appeared by his attorneys, Grant, Clark & Fox, and the said Executors having rendered their account under oath before the said Surrogate; and the said account having been filed:

• • • • • • •

And Lawrason Riggs, Jr., having been appointed Special Guardian for Angela del Drago, an infant over the age of fourteen years, and Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, all children of Mario del Drago, and the said Special Guardian having filed his report containing objections to the said account;

[fol. 10] And Harold W. Hastings having been appointed Special Guardian for Francesco del Drago, Alessandro del Drago, Angela del Drago and Maria del Drago, infants over the age of fourteen years, and Anna Maria del Drago, an infant under the age of fourteen years, all children of Clemente del Drago, and the said Special Guardian having filed his report containing objections to the said account;

And a hearing having been held before the said Surrogate on June 25th, 1940; and the Executors having filed an affidavit, verified July 8th, 1940 amending the said account, said affidavit having been served upon the attorneys for all of the parties appearing herein, and upon said Special Guardians, and having filed a supplemental account of their proceedings as such Executors covering the period from October 31st, 1939, through June 15, 1940, together with a supplemental petition, verified July 5th, 1940, praying that the said supplemental account be judicially settled, • • • and why the determination prayed for in said supplemental

petition should not be had, and the said supplemental citation having been returned with proof of the due service thereof upon all persons named in said supplemental citation;

* * * * * * *

And the affidavit of the Executor, Giovanni del Drago, sworn to the 14th day of October, 1940, from which it appears that Clemente Francesco del Drago, a necessary and proper party to this proceeding was born subsequent to the issuance of the citation and supplemental citation [fol. 11] herein having been filed herein on October 14th, 1940, and a supplemental citation having been thereupon issued directed to Clemente Francesco del Drago, citing him to show cause before the said Surrogate, at his office in the County of New York on the 3rd day of December, 1940, at ten-thirty o'clock in the forenoon of that day why the account and supplemental account of said Executors should not be judicially settled, and why the determination prayed for in said petition and in said supplemental petition should not be had, and an order having been entered in this Court on October 14th, 1940, designating said Harold W. Hastings to receive said supplemental citation on behalf of said Clemente Francesco del Drago, an infant under the age of fourteen years, and an order having been entered herein directing that service of said supplemental citation be made by publication;

And a further hearing having been held before the said Surrogate on October 14th, 1940, and the said Surrogate having heard the proofs and having rendered a decision in writing;

And it appearing that the decedent executed a will dated March 15th, 1933 in Paris, France, by which she disposed of all her property in that country to her husband, Giovanni del Drago, and that said will has been established in the Republic of France,

Now, on motion of Grant, Clark & Fox, attorneys for the petitioner, Byron Clark, Jr., it is further

[fol. 12] Ordered, adjudged and decreed, that the said will dated March 15th, 1933, executed by the decedent and established in the Republic of France, constituted a separate and independent disposition from the provisions contained in decedent's will admitted to probate in New York County, that the general clause of revocation of prior wills contained

in decedent's New York wills did not revoke nor in any manner affect the said French will, that the Executors are relieved from and are exempt from any responsibility for the administration of any assets of the decedent located in France, and that all of said assets, with the exception of a diamond tiara temporarily located in Paris, France, at the date of decedent's death, set forth in Schedules A and H of the account and specifically bequeathed to Paula Murray Coudert under the New York will, pass to Giovanni del Drago pursuant to the provisions of said French will;

And it further appearing that the decedent executed a will dated December 12th, 1931, in San Remo, Italy, by which she disposed of all of her property in that country to her husband, Giovanni del Drago, and that said will has been established in the Kingdom of Italy, it is further

Ordered, adjudged and decreed, that the said will dated December 12th, 1931, executed by the decedent and established in the Kingdom of Italy, constituted a separate and independent disposition from the provisions contained in decedent's will admitted to probate in New York County, [fol. 13] that the general clause of revocation of prior wills contained in decedent's New York wills did not revoke nor in any manner affect the said Italian will, that the Executors are relieved from and are exempt from any responsibility for the administration of any assets of the decedent located in Italy, and that all of said assets pass to Giovanni del Drago pursuant to the provisions of said Italian will; and it is further

* * * * * * *

Ordered, adjudged and decreed, that the amounts expended by the Executors for the improvement and rehabilitation of real property, as set forth in the account as amended by this decree, * * * be amortized by the Executors to December 31st, 1939, and by Corn Exchange Bank Trust Company, as Trustee * * * under the Ninth paragraph of the Will * * * from and after January 1st, 1940, * * * at the rate of five per cent (5%) per annum, * * *. and it is further

* * * * * * *

Ordered, adjudged and decreed, that the personal claim of the co-executor, Giovanni del Drago, to certain cash and currency, amounting to $10,339.23, located in the decedent's

safe deposit box at Fifth Avenue Safe Deposit Vaults, be, and the same hereby is, disallowed upon the merits, and that said cash and currency were the property of the decedent at the time of her death and constitute assets of her estate;

• • • • • • •

[fol. 14] Ordered, adjudged and decreed, that the account of the petitioners herein, as amended and supplemented, be, and the same hereby is, amended and modified in accordance with the determination of the Surrogate in the following particulars:

That Schedule A be amended—

(1) By including as an asset the following cash and currency:

• • • • • • •

$10,339.23

(2) By increasing the total of said Schedule from $1,213,682.28 to $1,224,021.51

• • • • • • •

That Schedule CC be amended —

• • • • • • •

(6) By correcting the recapitulation and totals of Schedule CC to read as follows:

[fol. 15] Recapitulation

	Total Cost	Amortization to 12/31/39	Cost Amortized to 12/31/39
411-413 Broadway	$3,542.00	$132.81	$3,409.19
258 East 112th St.	25,098.98	0.00	25,098.98
201 West 66th St.	23,919.27	211.42	23,707.85
23 Columbus Ave.	9,236.83	40.49	9,196.34
200 West 62nd St.	32,781.03	0.00	32,781.03
72 West 109th St.	24,441.61	221.91	24,219.70
	$119,019.72	$606.63	$118,413.09

• • • • • • •

And the said matter having been duly adjourned to this day, the said Surrogate, after having examined the said account and supplemental account, now here finds the state and condition of said account as so amended to be as stated and set forth in the following summary statement thereof to wit:

A summary statement of the account of Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, made by the Surrogate as judicially settled.

Principal Account

The said Executors are chargeable as follows:

With amount shown by Schedule A (Original capital of fund) [fol. 16]	$1,224,021.51	
With amount shown by Schedule A-1 (Increases on capital)	19,934.74	
Total principal charges		$1,243,956.25

The said Executors are credited as follows:

With amount shown by Schedule B (Realized decreases and losses on capital)	$30,857.89	
With amount shown by Schedule B-1 (Uncollectible items)	0.00	
With amount shown by Schedule C (Administration expenses actually paid)	376,149.64	
With amount shown by Schedule CC (Principal expended for improvement of real properties)	118,413.09	
With amount shown by Schedule E (Creditors' claims actually paid)	74,101.82	
With amount shown by Schedule F (Legacies or distributive shares actually paid)	379,982.88	
Total principal credits		979,505.32
Leaving on hand a balance of principal as shown by Schedule H		$264,450.93

[fol. 17] Income Account

The said Executors are chargeable as follows:

* * * * * * *

Combined Accounts

Principal remaining on hand	$264,450.93
Income remaining on hand	10,570.81
	$275,021.74

The foregoing principal balance of $264,450.93 consists of $127,541.51 in cash and $136,909.42 in other property on hand as of the 15th day of June, 1940.

The foregoing income balance of $10,570.81 consists entirely of cash on hand as of the 15th day of June, 1940.

And it appearing that the said Executors have fully accounted for all the monies and property of the Trust which have come into their hands as such Executors, and their account having been adjusted by the said Surrogate and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, adjudged and decreed, that the said account be, and the same hereby is, judicially settled; and it is further

* * * * * * *

Ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the Executors [fol. 18] they retain the sum of $48,035.10 * * * for the commissions * * * and that they retain the sum of $115.60 for their disbursements * * * and it is further

Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors they pay to Lawrason Riggs, Jr., Special Guardian * * * the sum of $7500, as and for his compensation * * * and that they pay to Harold W. Hastings, Special Guardian * * * the sum of $4000., as and for his compensation * * *

* * * * * * *

Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors, the following amounts be paid to the counsel

* * * as and for their costs and disbursements * * * to wit:

To Robert W. Maloney * * * the sum of $1057.60.

To William J. Donovan and David Teitelbaum * * * the sum of $276.

To Laughlin, Gerard, Halpin & Graham, * * * the sum of $307.60.

To Samuel R. Kurzman, * * * the sum of $161.60.

And it is further Ordered, adjudged and decreed, that the claim of the co-executor, Giovanni del Drago, for reimbursement for funeral expenses and expenses incurred in the probate contest and in the administration of the [fol. 19] estate * * * be, and the same hereby is allowed in the reduced amount of $15,073.35, * * *

And it is further Ordered, adjudged and decreed, that out of the cash balance of principal then remaining in the hands of the Executors they pay to said Giovanni del Drago said sum of $15,073.35 in reimbursement for said expenses, after deducting therefrom the sum of $930.00, representing the amount of the surcharge hereinbefore directed against said Giovanni del Drago; and it is further

* * * * * * *

Ordered, adjudged and decreed, that the Executors be, and they hereby are authorized to expend out of principal a sum not to exceed $10,000 for the purchase of a cemetery lot, the erection of a permanent tomb and the perpetual care thereof, in San Remo, Italy, for the permanent interment of said decedent's remains;

And it appearing that a claim dated April 27th, 1940, was filed with the Executors by Guiseppe Vitagliano * * * and that an answer was filed herein by Yorktown Building Corp. setting forth its claim * * *

Ordered, adjudged and decreed, that the compromise of the claims of Guiseppe Vitagliano and Yorktown Building Corp. in the sum of $4,000 be, and the same hereby is, approved, and that * * * the Executors pay * * * the sum of $4,000 in full * * * settlement of any and all claims of said Guiseppe Vitagliano, Yorktown Building Corp. and Ashland Building Corp. * * * and that said payment be made out of principal and added to the cost [fol. 20] of rehabilitation of premises No. 72 West 109th Street, New York City, and that said amount be amor-

tized . . . at the rate of five per cent (5%) per annum, . . .

. . . . . .

And it appearing that Marcel del Drago and Giovanni del Drago, individually, have asserted that any apportionment of the Federal estate tax pursuant to the provisions of Section 124 of the Decedent Estate Law is violative of certain articles of the Federal and New York State constitution-; it is further

Ordered, adjudged and decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

And it appearing that the will of decedent was executed on March 27th, 1934, and that said will contains no directions to the contrary, it is further

Ordered, adjudged and decreed, that the amount of the Federal and New York State estate taxes which may be paid by the Executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the [fol. 21] Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;

And it is further Ordered, adjudged and decreed, that the balance of the principal then remaining in the hands of the Executors, consisting of cash in the sum of $51,454.06 and other property of an inventory value of $136,909.42, be held and administered by said Executors in accordance with the terms and provisions of the Will of said decedent, subject to a further accounting; and it is further

. . . . . .

Ordered, adjudged and decreed, that upon making the payments above directed to be made, and upon compliance with all matters in this decree mentioned, said Giovanni del Drago and Byron Clark, Jr., as Executors of the Last

Will and Testament of Josephine del Drago, deceased, be and they hereby are, discharged of and from all liability as to all matters embraced in said accounting and/or this decree, except as to the property remaining in the hands of said Executors; and it is further

Ordered, adjudged and decreed, that a supplemental confirmatory decree be entered herein after the service and return of the supplemental citation heretofore issued to Clemente Francesco del Drago, an infant under the age of fourteen years, and after the filing of a supplemental report by the Special Guardian for said infant.

James A. Foley, Surrógate.

[fol. 22] In Surrogate's Court, County of New York

Supplemental Decree on Accounting as to Additional Infant Party, Dated December 24, 1940 Appealed From

Present: Honorable James A. Foley, *Surrogate.*

Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of the County and State of New York, having heretofore filed a petition verified on the 31st day of January, 1940, praying that the account of their proceedings as such Executors be judicially settled, and that a determination be had as prayed for in said petition, and having thereafter filed a supplemental petition and account;

And it appearing that Clemente Francesco del Drago, a necessary and proper party to this proceeding, was born subsequent to the issuance of the citation and supplemental citation herein, and that a supplemental citation was issued herein, directed to said Clemente Francesco del Drago, citing him to show cause before the said Surrogate, at his office in the County of New York on the 3rd day of December, 1940, at ten-thirty o'clock in the forenoon of that day, why the account and supplemental account of said Executors should not be judicially settled, and why the determination prayed for in said petition and in said supplemental petition should not be had, and an order having been en-

[fol. 23] tered in this Court on October 14, 1940, designating

Harold W. Hastings to receive said supplemental citation on behalf of said Clemente Francesco del Drago;

And a decree having been entered herein on November 19, 1940, said decree providing that a supplemental confirmatory decree be entered herein after the service and return of the supplemental citation heretofore issued to Clemente Francesco del Drago, an infant under the age of fourteen years, and after the filing of a supplemental report by the Special Guardian for said infant;

And the said supplemental citation having been returned with proof of the due service thereof on Clemente Francesco del Drago, an infant under the age of fourteen years, and on Harold W. Hastings, the person designated to receive said supplemental citation on behalf of said infant;

And Harold W. Hastings having been appointed Special Guardian for said Clemente Francesco del Drago, an infant under the age of fourteen years, and the said Special Guardian having filed his report wherein he finds said proceedings correct insofar as they affect the interests of his ward;

It is ordered, adjudged and decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further

Ordered, Adjudged and decreed that all of the terms and provisions of said decree shall be binding upon Clemente [fol. 24] Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree.

James A. Foley, Surrogate.

[fol. 25] In Surrogate's Court, County of New York

Petition for a Voluntary Accounting

To the Surrogate's Court of the County of New York:

The petition of Giovanni del Drago, residing at 270 Park Avenue, Borough of Manhattan, New York City, and Byron Clark, Jr., residing at Stratford and Haviland Roads, Harrison, New York, respectfully states:

That said decedent died on October 8th, 1937.

That Letters Testamentary under the Last Will and Testament of Josephine del Drago, deceased, who at the time of her death was a resident of New York County, were granted to your petitioners by the Surrogate's Court of New York County, New York, on the 6th day of April, 1938.

* * * * * * *

That the names and post-office addresses of * * * the husband of the decedent, of all trustees under the Will of decedent, of all legatees, of all assignees * * * and of all other necessary and proper parties, are as follows:

Giovanni del Drago, husband of the decedent, one of the petitioners, residing at No. 270 Park Avenue, New York City. Specific legacy (Sixth paragraph)—Seven thousand two hundred eleven ($7,211.) Dollars and legacy of Three Hundred Thousand ($300,000.) Dollars (Seventh para- [fol. 26] graph). Life estate in residue (Ninth paragraph). —value unknown.

Marcel del Drago, no relationship, Palazzo Colonna, Piazza S. S. Apostoli, Rome, Italy. Life estate in trust of Two Hundred Thousand ($200,000.) Dollars (Eighth paragraph).

Paula Murray Coudert, granddaughter of the decedent, residing at Oyster Bay, Nassau County, New York. Specific bequest of diamond tiara (Fifth paragraph).

Frederick E. Grant, no relationship, residing at Oakdene, Bernardsville, New Jersey. Legacy of Twenty-five Hundred ($2500.) Dollars (Fourth paragraph).

Corn Exchange Bank Trust Company, 13 William Street, New York City, Trustee of Two Hundred Thousand ($200,000.) Dollars trust (Eighth paragraph) and Trustee of trust of residue (Ninth paragraph)—value unknown.

The following are the only children of Clemente del Drago: Francesco del Drago, Via B. Oriani 28, Rome, Italy. * * * Alessandro del Drago, Via B. Oriani 28, Rome, Italy. * * * Angela del Drago, Via B. Oriani 28, Rome, Italy. * * * Maria Milagros del Drago, Via B. Oriani 28, Rome, Italy. * * * Anna Maria del Drago, Via B. Oriani 28, Rome, Italy. Contingent remainder interest in trust under Eighth paragraph.

No children of said Clemente del Drago are deceased.

The following are the only children of Mario del Drago: Angela del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * Maria del Drago, Via Del Monte Delle

Gioie 12, Rome, Italy. * * * Ferdinando del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * [fol. 27] Filippo del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. * * * Giovanna del Drago, Via Del Monte Delle Gioie 12, Rome, Italy. Contingent remainder interest in trust under Ninth paragraph.

No children of said Mario del Drago are deceased.

All of said persons are of full age and sound mind except the said Francesco del Drago, Alessandro del Drago, Angela del Drago (daughter of Clemente del Drago), Maria Milagros del Drago and Angela del Drago (daughter of Mario del Drago), who are infants over the age of fourteen years, and the said Anna Maria del Drago, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, who are infants under the age of fourteen years. Said infants reside with their respective fathers named above at the addresses hereinabove set forth." They have no general or testamentary guardians.

Marcel del Drago has no children or issue.

* * * * * * *

That as stated in Schedule J of said account the Federal and New York Estate Taxes have not been finally assessed and paid by the Executors. That the returns have been filed and partial payments on account of the taxes have been made by the Executors. That the audit of these returns cannot be completed until certain of the questions raised in this petition have been determined. That accordingly, several months may elapse before the Estate Taxes are finally fixed and determined.

That in the meantime, the Executors deem it advisable to make a partial distribution to the Trustee of the resid- [fol. 28] uary trust under the Will, but it is impossible to partially set up this Trust in the absence of a determination as to whether or not there must be an apportionment of the Estate Taxes as provided in Section 124 of the Decedent Estate Law. That accordingly, the Executors request a determination as to whether or not the Federal and New York Estate Taxes paid and to be paid must be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law.

* * * * * * *

That the execution of this petition by the petitioner, Giovanni del Drago, shall not be deemed a waiver of any of his individual claims, rights or remedies, and is made without prejudice thereto.

That your petitioners are desirous of rendering to said Surrogate's Court an account of their proceedings, and therefore pray that their account be judicially settled, and * * * as to whether the Federal and New York Estate Taxes are to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law * * * and for such other and further relief as the Court may deem just and proper, and that an order be granted according to law directing the service of the citation personally without the State or by publication upon the persons hereinbefore stated to be non-residents of the State or otherwise.

(Verified by Giovanni del Drago and Byron Clark, Jr., Petitioners, dated January 31, 1940.)

[fol. 29] In Surrogate's Court, County of New York

Account of Executors Proceedings

To the Surrogate's Court of the County of New York:

The undersigned, Giovanni del Drago and Byron Clark, Jr., do render the following account of their proceedings as Executors of the Last Will and Testament of Josephine del Drago, deceased, from the 8th day of October, 1937, to the 31st day of October, 1939. On the 6th day of April, 1938, Letters Testamentary were issued to Giovanni del Drago and Byron Clark, Jr.

Deceased died a resident of New York County on the 8th day of October, 1937.

* * * * * * *

Summary

The following is a summary statement of their account (as corrected by a supplemental account covering period October 31, 1939 to June 15, 1940):

Principal Account

Charges:		
Sched. A (Orig. capital)	$1,213,682.28	
Sched. A-1 (increases)	19,934.74	
Total		$1,233,617.02
[fol. 30] Credits:		
Sched. B. (decreases and losses)	$30,857.89	
Sched. B-1 (Uncollectible items)	0.00	
Sched. C (Administration expenses actually paid)	377,079.64	
Sched. CC (Expenditure to improve real properties)	118,417.30	
Sched. E (creditors claims actually paid)	74,101.82	
Sched. F (Legacies or distributive shares actually paid)	379,982.88	
Total		980,439.53
Sched. H. Principal bal. on hand		$253,177.49

[fol. 31] Income Account

Charges:		
Sched. A-2 (total income)	$111,399.18	$111,399.18
Credits:		
Sched. C-2 (Payments for administration and maintenance)	53,328.31	
Sched. F-1 (Distribution of income to beneficiaries)	47,495.85	
Total		$100,824.16
Sched. H-1 (Undistributed income)		$ 10,575.02

Combined Accounts

Principal on hand	$253,177.49
Income on hand	10,575.02
	$263,752.51

The foregoing principal balance of $253,177.49 consists of $117,198.07 in cash and $135,979.42 in other property on hand as of the 15th day of June 1940. It is subject to deduction of estimated commissions amounting to $43,407.60 shown in Schedule K., and to the proper charge to principal of the expense of this accounting.

• • • • • • • •

The attached schedules which are severally signed by them, are part of this account.

Giovanni del Drago, Bryon Clark, Jr., Accountants.

[fol. 32] Schedule A. (An itemized enumeration of the stocks and bonds, mortgages, cash, and other miscellaneous personal property, comprising the total of $1,214,098.78.)

Schedule A-1. (An itemized enumeration of the increases derived from capital assets.)

Schedule B. (An itemized enumeration of all decreases in capital assets.)

Schedule B-1. (Uncollectible items; none found for inclusion herein.)

Schedule C. (An itemized enumeration of moneys paid by the executors for administration, funeral and other necessary expenses, including the following:

1938:

Apr. 7	State Tax Comm., payment on account of New York Estate Tax	$ 70,000.00

• • • • • • •

1939:

Jan. 5	Collector of Internal Revenue Federal Estate Tax	225,000.00
Apr. 6	Federal Estate Tax	4,726.21

Schedule CC. (An itemized enumeration of expenditures to improve real property in the aggregate of $118,417.30 as shown in supplemental account.)

[fol. 33] Schedule C-1. (An itemized enumeration of unpaid claims for administration, funeral and other expenses follows.)

Schedule D. (Claims presented by creditors, of which there were none, except those set forth in Schedule E.)

Schedule D-1. (Judgments or decrees rendered—none.)

Schedule D-2; D-3. (No claims were found for inclusion.)

Schedule E. (An itemized enumeration of all claims paid by the executors including the following):

1939

Jan. 24	Paula M. Coudert, settlement of claim pursuant to compromise agreement	$59,750
	Frederic R. Coudert, Jr., as Successor trustee under Will of Pauline S. Murray pursuant to compromise agreement	250

Schedule F. (An itemized enumeration of payments by the executors out of capital to devisees, legatees, etc., including the following):

To Giovanni del Drago on account of legacy under Seventh Paragraph of Will.

[fol. 34] 1938:

April 20	25,000	
May 19	50,000	
July 7	40,000	
" 29	35,000	
Nov. 10	70,000	
		$220,000

To Corn Exchange Bank Trust Company as trustee of the trust for the benefit of Marcel del Drago and remainder-men under the Eighth Paragraph of the Will:

6-23-38	Cash		$50,000.00	
6-30-38	Securities:			
	$6000 A. T. & T. Deb., 5½% at 112⅞	$6,772.50		
	3000 New Am. Gas 5% at 116	3,480.00		
	10000 Cin. U. T. Co. at 108¾	10,875.00		
	10000 P. R. R. at 94¼	9,425.00		
	6000 Kingdom of Norway at 106	6,360.00		
	75 S. O. at 53⅛	3,984.38		
	200 A. T. & T. at 143⅛	28,625.00		
			69,521.88	
10-31-38	Cash		28,000.00	
				$147,521.88
7-19-38	To Giovanni del Drago jewelry			7,211.00

[fol. 35] Schedule G. (An itemized enumeration of assets, fully liquidated without increase or decrease, follows.)

Schedule H. (An itemized enumeration of cash, securities and other personal property, constituting capital remaining in the executors hands follows.)

Schedule A-2. (An itemized enumeration of income received by the accountants follows.)

Schedule C-2. (An itemized enumeration of expenditures for administration chargeable to income, including the payment of taxes on the following real estate.)

1939:

Apr. 25 City Collector, Real Estate taxes for period 1-1-39 to 6-30-39

Location	*Assessed Valuation*	*Taxes*	
283-5 Greenwich St.	$35,000	$507.50	
64-66 Lispenard St.	31,000	449.50	
413 Broadway	80,000	1,160.00	
411 Broadway	49,000	710.50	
23 Columbus Ave.	40,000	580.00	
54 Amsterdam Ave.	43,500	630.75	
140 Amsterdam Ave.	50,000	725.00	
1121 Second Ave.	67,000	971.50	
2173-75 Second Ave.	18,000	261.00	
995 Columbus Ave.	43,000	623.50	6,619.25

[fol. 36] Schedule F-1. (An itemized enumeration of payments out of income to devisees, legatees, trustees, etc., follows.)

Schedule H-1. (An itemized statement of undistributed income follows.)

Schedule I. (An enumeration of the names and addresses of the various legatees and other persons entitled to take under the Will.)

Schedule J

A statement of all estate taxes assessed and paid by them upon or in respect of any property required to be included in the gross estate of the decedent under the provisions of the Tax Law or under the provisions of any United States Revenue Act.

The Federal and New York Estate Taxes have not been finally fixed and determined. The returns have been filed but their examination and audit has not been completed. Upon the determination of the various questions raised in this proceeding, the Executors will be able to complete the estate tax proceedings.

The following payments have been made on account of the Federal and New York Estate taxes, to wit:

[fol. 37]

	New York Estate Tax		
1938: Apr. 7	State Tax Commission		$ 70,000.00
	Federal Estate Tax		
1939: Jan. 5	Coll. of Internal Revenue	$225,000.00	
Apr. 6	Coll. of Internal Revenue	4,726.21	229,726.21
			$299,726.21

As set forth in Schedule "L" of the account, the Executors request a determination of the question of whether the Federal and New York Estate Taxes are properly to be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law.

Schedule K. (An itemized computation of commissions due upon the accounting.)

Schedule L. (A statement of all other matters affecting the administration of said estate or fund and the rights of those interested therein, including the same allegations, pertaining to the apportionment of Estate Taxes, as those in the executors petition, pages 27 and 28 of this record.)

[fol. 38] In Surrogate's Court, County of New York

Answer of Giovanni del Drago

Giovanni Del Drago, individually, answering the petition of the petitioners herein by Robert W. Maloney, his attorney, respectfully shows to the Court and alleges:

* * * * * * *

Third: In respect to the apportionment of the Federal and New York Estate Taxes under Section 124 of the Decedent's Estate Law.

This respondent respectfully objects to the apportionment and assessment against him personally of any portion

of the Federal Estate Tax heretofore or hereafter paid by the executors of said decedent's estate, and objects to any deduction therefor from any legacy or interest which he may have or may receive under decedent's will as prayed for in the petition herein, pursuant to Chapter 709 of the laws of 1930 as amended, and known as Section 124 of the Decedent's Estate Act and to Chapter 710 of the laws of 1930 as amended, known as Chapter 249T of the Tax law, and further objects to the entry of any order or decree herein made by the Surrogate pursuant to said statutes or either of them directing any apportionment or proration of the said Federal Estate Tax or any portion thereof against this respondent, or any legacy or interest which he may receive, upon the ground that said Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void and are violative of Article VI of the Constitution of the United States; Article I, Sections 8 and 9 of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United [fol. 39] States, and are further violative of Article I, Section 1, Article I, Section 11, and Article III, Section 22, of the Constitution of the State of New York, and are in conflict with and in violation of the provisions of the Federal Estate Tax Law, being Title III of the Revenue Acts of 1926 and 1932 as amended by the Revenue Acts of 1934, 1935, 1936, and 1938, and as amended known as Section 826-B of the United States Internal Revenue Code in the following respects:

1. Chapter 709 and Chapter 710 of the laws of 1930 as amended are unconstitutional and void in that they confer, or attempt to confer, upon the Surrogate or upon the Surrogate's Court, powers and duties the exercise of which by the Surrogate or by the Surrogate's Court is unauthorized by and repugnant to the Constitution of the United States insofar as such chapters purport to vary, change, supplement or modify the method and burden of taxation arising out of the devolution of the property of the decedent upon her death under the provisions of the United States Revenue Act as amended, and insofar as said chapters purport to impose, extend, assess, or prorate the payment of the said Federal Estate Tax or any portion thereof upon or against this respondent, or upon the legacy or benefit to him given under decedent's will, or to burden or charge

the legacy or benefit to him given under decedent's will with the payment of or any contribution to the said Federal Estate Tax or any part thereof.

2. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void insofar as said chapters impose or assess, or attempt to impose or assess [fol. 40] against this respondent, by any order or decree of the Surrogate or of the Surrogate's Court, any portion of the Federal Estate Tax heretofore or hereafter levied against the estate of the decedent, or to deduct or to attempt to deduct any portion of the said Federal Estate Tax from any legacy or benefit which this respondent has received or may receive under the decedent's will, in that:

(a). That said statutes purport or attempt to change, alter, modify or apportion a tax imposed under a statute of the United States regularly and duly enacted by the Congress of the United States pursuant to the Federal Constitution, to wit, the Federal Estate Tax Law.

(b). Said statutes abridge, amend, modify, or attempt to abridge, amend or modify the said federal statute, to wit, Title III of the Acts of 1926 and 1932 as amended, insofar as such Acts apply to citizens of the State of New York, and destroy the uniformity of operation of the said Federal Estate Tax Law throughout the United States.

(c). That the Legislature of the State of New York had no power to enact legislation, to wit, Chapters 709 and 710 of the laws of 1930 as amended, the effect of which statutes was to amend, modify and change laws duly enacted by the Congress of the United States and known as Title III of the Revenue Acts of 1926 and 1932 as amended.

(d). That the Legislature of the State of New York had [fol. 41] no power or authority to change, modify, amend or alter a tax or the method of collection of a tax duly imposed by the Congress of the United States and to apportion the said tax between persons not primarily liable therefor under the said Federal Revenue Acts.

(e). That Section 314-B of the United States Revenue Act of 1926 as amended, now being Section 826-B of the United States Internal Revenue Code, has been adopted by the Congress of the United States and is the supreme

law of the land as defined by the Constitution of the United States, and that Chapters 709 and 710 of the laws of 1930 as amended, conflict with the said federal statutes and are void and of no effect.

3. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void insofar as said statutes delegate or attempt to delegate to a judicial officer of the State of New York, to wit, the Surrogate, power and authority to modify, change, alter or allocate a tax imposed by a statute of the United States duly adopted, to wit, the Federal Estate Tax Law hereinabove mentioned.

4. That Chapters 709 and 710 of the laws of 1930 are unconstitutional and void in that any allocation of the Federal Estate Tax made by the Surrogate pursuant to said act against any legacy or benefit of this respondent, or any deduction from the full amount of the legacy and benefit which this respondent may receive, deprives, or attempts to deprive this respondent of property, to wit, [fol. 42] the legacy and benefit, or a portion of the legacy and benefit to him given under the decedent's will, and diminishes the same without due process of law and takes from this respondent property, to wit, a portion of his legacy or benefit under the decedent's will without just compensation, and denies to this respondent the equal protection of the laws.

5. That Chapters 709 and 710 of the laws of 1930 as amended are unconstitutional and void in that said statutes confer, or attempt to confer, upon a judicial officer of the State of New York, to wit, the surrogate, powers and duties in respect to taxes imposed by the Congress of the United States, and gives and grants to the said Surrogate, in his discretion, power and authority to modify, change, and alter the tax so imposed by Congress under the Federal Estate Tax Law the exercise of which power under the said statutes by the Surrogate, is unauthorized by and repugnant to the Constitution of the United States and of the State of New York, and to the Federal Estate Tax Law.

6. That Title III of the United States Revenue Acts of 1926 and 1932, as amended, imposes a tax upon the transfer of the net estate of the deceased passing, based upon the value thereof. That the said tax is laid upon the prin-

ciple that death is the generating source from which the authority to impose such tax lies, and that the tax imposed under such statute is levied upon the power to transmit by reason of the passing of the property on the death of the property owner; that Chapters 709 and 710 of the laws of 1930 change, or attempt to change the nature and char-
[fol. 43] acter of the tax imposed by the federal statutes above set forth, and to change and modify the source of payment of the said tax in that said Chapters 709 and 710 of the laws of 1930 as amended transfer the taxable obligation due from the decedent's estate to the United States Government to the individual beneficiaries named in decedent's will, and to assess against said individual beneficiaries, or their respective legacies or interests, a direct tax to be fixed by the Surrogate, in his discretion, under the decree to be made herein, and that the Legislature of the State of New York did not and does not possess the power to change the nature and character of the said tax imposed by the Government of the United States, or the obligation for the payment thereof.

* * * * * * *

Wherefore, this respondent respectfully prays:

* * * * * * *

III. That no portion of the Federal Estate Tax be allocated or apportioned between and among the several beneficiaries and that Chapters 709 and 710 of the laws of 1930 as amended, insofar as said statutes attempt to regulate, apportion or allocate any portion of the Federal Estate Tax against any individual or any individuals legacy or benefit, be declared unconstitutional and void.

IV. That the respondent may have such other, further and different relief as may be just, equitable and proper in the premises.

Giovanni del Drago, Individually.

[fol. 44] In Surrogate's Court, County of New York

Answer and Objections of Marcel del Drago

Marcel del Drago, a person interested in the above entitled proceeding as a beneficiary of a trust provided in

the Will of said Josephine del Drago, by William J. Donovan and David Teitelbaum, his attorneys, answering the petition for a voluntary accounting by Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, deceased, heretofore filed in this Court, and making objections to said accounting, respectfully shows to this court and alleges:

First: This court has no power to determine that the Federal estate taxes paid and to be paid by the estate of the above named decedent shall be apportioned pursuant to the provisions of section 124 of the decedent estate law inasmuch as the provisions of said section 124 requiring the apportionment of Federal estate taxes, as applied to the estate of the above named decedent are invalid because they are inconsistent with the provisions of the Federal Revenue Acts which are paramount and controlling. The Federal Revenue Acts provide in substance that Federal estate taxes shall be a general charge against the estate of decedents and shall be entirely borne by the residue rather than be apportioned unless otherwise directed by the Will of the decedent. The Will of the above named decedent does not otherwise direct.

[fol. 45] Second: This respondent objects to Schedule "J", Schedule "L", and to the whole of said account for the reason that it does not provide for the charging of all Federal estate taxes paid and to be paid by the estate against the residue of the estate of the Testatrix. The ground for this objection is the same as that set forth in paragraph First hereof.

Third: This respondent objects to Schedule "J", Schedule "L", and to the whole of said account for the reason that it does not provide for the charging of all Federal and New York estate taxes paid and to be paid by the estate against the residue of the estate of the Testatrix on the ground that, as this respondent's attorneys are informed and believe, it was the intention of the Testatrix to have all of said estate taxes paid out of her residuary estate.

Fourth: This respondent reserves the right to reply to any matters affecting him which may be alleged or pleaded in the answer, objections, or reports of any of the other respondents herein.

Wherefore this respondent respectfully prays:

(1) That this court order and decree that all the Federal estate taxes paid and to be paid by the estate of the above named decedent be charged against the residue thereof and that no part of said Federal estate taxes be apportioned to or deducted from the trust fund of $200,000 for the benefit of this respondent and certain remaindermen provided for in paragraph "Eighth" of the Will of the above named decedent: and

[fol. 46] (2) That this Court order and decree that all Federal and New York estate taxes paid and to be paid by the estate of the above named decedent be charged against the residue thereof and that no part of said Federal and New York estate taxes be apportioned to or deducted from the trust fund of $200,000 for the benefit of this respondent and certain remaindermen provided for in paragraph "Eighth" of the Will of the above named decedent.

[fol. 47] In Surrogate's Court, County of New York

Report of Harold W. Hastings, Special Guardian of Infant Remainderman Under 8th Paragraph of Will

I, Harold W. Hastings, * * * having been duly appointed as Special Guardian of children of Clemente del Drago, Francesco del Drago, Alessandro del Drago, Angelo del Drago, Maria Milagros del Drago, Anna Maria del Drago * * * I have carefully examined the account of this proceeding together with all the papers relating thereto.

I respectfully submit my findings consequent upon such examination as follows:

All of the above infants are over the age of 14 years, except Anna Maria del Drago, who is under the age of 14 years. All of the said infants are Italian born and reside in Italy.

* * * * * * *

In this proceeding, the executors ask for a construction of the said Will and for certain instructions.

* * * * * * *

In addition thereto, the executors request a determination as to whether or not the Federal and New York Estate Tax paid and to be paid must be apportioned, pursuant to the provision, Section 124 of the Decedent Estate Law.

Interest of Infants

By Article Eighth of the decedent's Will, the trust of $200,000 was created for the benefit of Marcel del Drago, [fol. 48] with the remainder to the lawful children of the said Marcel del Drago. In the event of Marcel del Drago's death without issue, the said article provides that the said infants, children of Clemente del Drago, Francesco del Drago, Alessandro del Drago, Angela del Drago, Maria Milagros del Drago, Anna Maria del Drago, are to receive the said fund. The said Marcel del Drago is now living and has no children.

* * * In Paragraph Eighth which is the paragraph creating the trust in which the infants I represent are interested, the testator named the Corn Exchange Bank Trust Company, as trustee. Incidentally, the Corn Exchange Bank Trust Company is the trustee of the residuary Estate in which the infants I represent have no interest.

In addition to the principal assets of the estate set forth in Schedule A of the value of $1,214,098.78, the estate has real estate of a value of more than $221,000 and certain property alleged to be in France and Italy, not specified in this accounting.

I find that in accordance with the discretionary powers vested in them, the executors sold most of the securities. The balance was delivered to the Corn Exchange Bank Trust Company, as trustee, under Paragraph Eighth of the Will. The real estate remains in the residuary estate.

* * * * * * *

The determination of the various requests for instructions and construction requested in the petition of the accounting parties do not affect the interests of my wards except that on the petition for an apportionment of the Estate taxes.

[fol. 49] Giovanni del Drago, individually, has filed what is called an answer to the petition and under the heading "Third" therein objects on various grounds to the apportionment and assessment against him personally of any portion of the Federal Estate Tax.

Since no tax has been apportioned as yet, I do not see how my wards can formally object, but it is, of course, of vital interest to them to have the taxes allocated to the trust in paragraph Eighth made as small as possible.

For that purpose, and to preserve the rights of my wards in the event that it be held that the Federal tax is not to be apportioned but must be a charge against the residuary estate, I join in the prayer of Giovanni del Drago, individually, that no part of the said Federal tax be apportioned or allocated against any individual legacy or benefit and that the same be charged against the residuary estate only.

Conclusions and Recommendations

I conclude that the interests of my wards have been fully protected and recommend that so far as they are concerned, the account be allowed and settled as filed. However, I would like to be heard on their behalf on the question of the apportionment of the Federal Taxes.

Dated, New York, April 16, 1940.

Harold W. Hastings, Special Guardian.

[fol. 50] In Surrogate's Court, County of New York

Report and Objections of Lawrason Riggs, Special Guardian of Infant Remaindermen Under 9th Paragraph of Will

To the Surrogate's Court of the County of New York:

I, Lawrason Riggs, Jr. having been appointed by this Court and having duly qualified as Special Guardian to represent and protect the interests of Angela del Drago, an infant over the age of fourteen years, Maria del Drago, Ferdinando del Drago, Filippo del Drago and Giovanna del Drago, infants under the age of fourteen years, all children of Mario del Drago, respectfully report as follows:

* * * * * * *

6. The said Last Will and Testament of the decedent Josephine del Drago dated March 27th, 1934, was, after the settlement of a contest, duly admitted to probate by a Decree dated April 6, 1938, resettled on the 25th day of April, 1938, and letters testamentary were issued thereon

to Giovanni del Drago and Byron Clark, Jr. the accounting Executors herein, on April 6, 1938. Pursuant to the agreement of settlement and to the Decree above mentioned $59,750 was paid to Paula M. Coudert and $250 to F. R. Coudert Jr. as Successor Trustee of the Estate of Paula Murray, or a total of $60,000 for the settlement of the case, all out of the residuary estate.

7. The infants for whom I am acting have the remainder interest in the trust of the residuary estate pursuant to the [fol. 51] Ninth article of the Will of said decedent, which reads as follows:

"Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and including any and all property over which I have power of appointment, and including all lapsed legacies, I give, devise and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of my beloved husband Giovanni del Drago of Rome, Kingdom of Italy, if he shall survive me, during the term of his life, and upon his death, or at my death if he shall have predeceased me, I direct my trustee and/or executors, as the case may be, to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock of Mario del Drago, second son of Luigi del Drago, of Rome, Italy, a brother of my husband, and/or the children born in lawful wedlock of any such child which may then be deceased, to be theirs absolutely and forever."

8. This is a proceeding to settle the accounts of the petitioning Executors up to October 31, 1939, and for a construction of the decedent's Will and for instructions on [fol. 52] various points that are raised in the petition and which are hereinafter referred to in more detail.

* * * * * * *

12. (a) Mr. Giovanni del Drago, one of the accounting Executors herein, is the surviving spouse of the decedent Josephine del Drago. Under her Will, he receives a bequest of $300,000.00 and her personal effects, together with

the income for life of the residuary trust under article Ninth of the Will. Mr. Giovanni del Drago is the great uncle of the infants for whom I have been appointed Guardian herein and who are the remaindermen of the residuary trust.

(b) There is also a trust under the eighth article of this Will of $200,000. for the life benefit of Marcel del Drago with remainder to his issue and in default of issue to the children of Clemente del Drago. My wards have a contingent interest in the remainder of this trust in the event that all prior remainders fail.

Objections and Comments

* * * * * * *

VI. Apportionment of Estate Taxes

(a) The petitioners have failed to include a schedule apportioning the Federal and New York Estate Taxes as required by §124 of the Decedent Estate Law but have requested a determination as to whether or not such apportionment should be made.

(b) Decedent's Will contains no provision specifically mentioning the payment of New York and Federal Estate [fol. 53] taxes and contains no provision whatever concerning the payment of charges against the estate except the usual provision for the payment of debts and funeral expenses. This provision is as follows:

"First: I direct my executors hereinafter named to pay all my just debts and funeral expenses as soon after my death as is practical."

(c) The account shows that a payment has been made on account of the New York Estate Tax in the sum of $70,000.00 and a payment of $229,726.21 for Federal Estate Tax. The account states that both of these amounts are subject to final determination.

(d) The Special Guardian objects to the failure of the petitioners to include a schedule apportioning the taxes and takes the position that the tax items already paid and the amounts of the taxes as finally determined must be apportioned as provided by law on the ground that there is no provision in the Will that purports to vary the statutory

formula. This point is of overwhelming importance to my wards since the amount of the taxes already paid would, if charged to the residue of the estate together with the commissions and all other items properly to be paid out of the residue consume entirely the cash and securities of $276,435.77 and even a part of the real estate, described in Schedule "L". This would leave only the residue of the real estate without any cash to go into the residuary trust.

Lawrason Riggs, Jr., Special Guardian.

[fol. 54] In Surrogate's Court, County of New York

Statement of Evidence

Hall of Records, New York, N. Y.,
October 14, 1940.

Before: Hon. James A. Foley, Surrogate

Appearances:

Grant, Clark & Fox, Esqs., (Littleton Fox, Esq., of Counsel), For Petitioner, Byron Clark, Jr.

Ludwig M. Wilson, Esq., For Petitioner, Giovanni del Drago.

Laughlin, Gerard, Bowers & Halpin, Esqs., (Miss Alice G. Baldridge, of Counsel), For the Trustee, Corn Exchange Bank Trust Company.

Robert W. Maloney, Esq., for Giovanni del Drago, individually.

Donovan, Leisure, Newton & Lombard, Esqs., (David Teitelbaum, Esq., and Guy Martin, Esq., of Counsel), For Objectant, Marcel del Drago.

Lawrason Riggs, Jr., Esq., and Frederick E. Mygatt, Jr., Esq., of Counsel, Special Guardian.

Harold W. Hastings, Esq., Special Guardian.

[fol. 55] Excerpt from Stenographer's Minutes

Mr. Maloney: The only other question, if your Honor please, is the question of the apportionment of the inheritance taxes between and among the several legatees. As your Honor realizes, Mr. del Drago receives a large legacy and a life estate in a——

The Surrogate: What is difficult about that?

Mr. Maloney: The only question here is that we are challenging Section 124 and we are raising constitutional questions.

The Surrogate: You can save that for the United States Supreme Court. They passed on it once.

Mr. Maloney: I thought that your Honor had strong opinions on it, but we have raised this question which I do not think has been directly presented to you in this manner. We have separated the Federal estate tax from the State. We raise no question about the State. They can lay and assess their taxes the way they please, but we do say that as far as the Federal taxes go, under the law and under the Constitution, that the Federal law is the supreme law of the land, and that the right of the Legislature to delegate this to the Surrogate and to anybody else is beyond its power and that it is in conflict with the Federal cases.

The Surrogate: Do you not know that the Federal courts were the first ones to exercise this rule of equity and that the New York courts refused to follow it?

Mr. Maloney: You mean Judge Hough's decision over here in that celebrated case? I do not think it was before them. It was a purely arbitrary rule, and it was obiter that he threw in there.

[fol. 56] The Surrogate: He said the State could provide for the division.

Mr. Maloney: The State could settle the controversy or the controversy could be settled in the State courts.

The Surrogate: That same question was raised in a case that went to the United States Supreme Court from Judge Delehanty.

Mr. Maloney: I do not think it was raised. They joined the two and they did not raise this question nor did they raise it on the equal fixation of tax upon all concerned in all states, so we will submit, if your Honor pleases, and ask a ruling.

The Surrogate: Let the record show that you have raised the question and that I overrule it; that you have raised the Federal question and the Federal Constitution as to jurisdiction and violation of the Federal Constitution and any other ground such as lack of power in this Court.

Mr. Maloney: It is set forth in the answer of Mr. del Drago as an individual. I would ask a specific ruling, if

your Honor pleases, that the objections raised as to the constitutionality of the statute, the right of the Legislature to enact the statute and the power delegated to the Surrogate's Court, that all such objections are set forth in the answer of Giovanni del Drago individually are overruled as a matter of law. Does your Honor so rule?

The Surrogate: I so hold under the authority of Matter of Scott, 158 Misc., 481, affd. 249 App. Div. 542; affd. 274 N. Y. 538; certiorari denied at 302 U. S. 721.

Mr. Maloney: On the question of uniformity of law, that question is, of course, as to the effect of the transportation [fol. 57] of the tax and placing it upon other shoulders than that contemplated by the Federal Act.

The Surrogate: I understand the point you are making. It is not necessary to develop it. Every Federal constitutional question that you raised is overruled.

Mr. Wilson: Can we not possibly have a separate decree which would give us a chance to make a direct appeal to the Court of Appeals and avoid the Appellate Division?

The Surrogate: No, there is no way of doing that. I do not think the Court of Appeals would let you hurdle the Appellate Division.

Mr. Maloney: Mr. Wilson helped me and I have written a brief that I would like to submit to your Honor and Mr. Donovan's office has sent one down.

. . . . . .

The Surrogate: I direct the apportionment of both the Federal and State tax pursuant to Section 124 of the Decedent Estate Law.

[fol. 58] PART OF CLAIMANT'S EXHIBIT 1

(Letter of Morgan J. O'Brien)

New York, January 17, 1938.

Count Giovanni del Drago, Hotel Gladstone, 114 East 52nd Street, New York, N. Y.

MY DEAR COUNT DEL DRAGO:

Following up my talk with you on Friday and your later telephone communication, I got in touch with Mr. Coudert

and told him what your suggestion was. To make the matter perfectly clear, my thought was, in view of what has happened, to see if by sitting around in conference some sort of understanding or settlement might be effected.

It seems that your theory of the settlement effected in 1908 or 1909 and the subsequent settlement of the 1916 suit and that of Mr. Coudert do not coincide. It seems to me that the first thing that both sides should try to accomplish is to see whether or not they can agree on what these two settlements decided. Rather than go to a long protracted litigation, it might be that both sides can come to some understanding as to what the former suits were all about and what was settled in 1908 and 1916. Personally I feel very optimistic that both sides can agree on what these various settlements aimed at.

So far as the objections to the probate of the will are concerned, I told Mr. Coudert that you would be willing to sit around in a conference to see what could be done, pro-
[fol. 59] vided he withdrew all objections to the probate of the present will and allowed it to go to probate. Mr. Coudert said his wife was just as anxious to avoid litigation as you are, but he felt unwilling to do anything about withdrawing his objections to the probate, but was entirely willing to indefinitely postpone the probate proceedings with a view of trying to settle the whole matter in some amicable way. If some settlement can be reached, of course, the will contest will end and the will can be admitted to probate.

Personally I feel that both sides should make some attempt to arrive at a conclusion rather than have a long drawn out litigation that will be expensive and an annoyance to all concerned.

Yours sincerely, (Signed) Morgan J. O'Brien, Jr.

[fol. 60] PART OF CLAIMANT'S EXHIBIT 2

(Letter of Grant & Clark)

November 10, 1937.

Don Giovanni del Drago, 4 Via Solaro, San Remo, Italy.

DEAR SIR:

We acknowledge receipt of your letter dated October 28, 1937. This morning we cabled you by deferred cable as follows:

"Believe adverse party will institute action against estate claiming decedent had only life estate in property unless we can satisfy her no cause of action exists stop in our opinion matter was disposed of in first suit we desire all papers letter follows."

Under the Will of the late August Schmid, two-thirds of his estate was left to his two children (one of whom was the late Pauline S. Murray) and one-third was directed to be held in trust during the lifetime of Donna del Drago, the income therefrom to be paid to her and upon her death the principal to go to the two daughters. Accordingly, the interest of Donna del Drago in the estate of August Schmid was only a life estate in one-third of his property. Donna del Drago would also have been entitled to a further share by reason of the death of one of their children, Josephine, who died without leaving a Will.

[fol. 61] Now upon Donna del Drago's death Mr. Coudert has asked us whether Mrs. Murray's estate or Mrs. Coudert do not still have a remainder interest under the will of August Schmid.

We believe that this question was finally disposed of in the former litigations and that Mrs. Murray received everything to which she was entitled, and that neither her estate nor her daughter have any further interest in the estate of August Schmid, or any claim against the estate of Donna del Drago.

As you probably know, in 1908 Mrs. Murray brought an action in the Supreme Court against Donna del Drago individually and as Executrix of and Trustee under the Will of August Schmid, deceased, and Lion Brewery of New York City. This action was settled by agreement dated May 18th, 1909. There was also another action in 1918, which was likewise settled.

We are attempting to gather all the information possible in order that we may be in a position to satisfy Mrs. Coudert that she has no claim. Some of the papers are in this office and we assume that certain of the original documents will be found in Donna del Drago's safe deposit boxes. However, we do not know just what we will find when the boxes are opened. Our reason for requesting you to bring with you any papers you might find in Italy relating to this question was in order that we would have all the available papers at our disposal.

Our firm did not appear in either of these two actions nor did any of our predecessor firms and, therefore, it is not surprising that we do not have in our files all of the papers in connection therewith. However, we have made an extended search of our files and have come across certain of [fol. 62] the important papers. In the first action the firm of Parsons, Closson & McIlvaine were the attorneys of record. We have communicated with them in an attempt to ascertain whether they had in their possession any of the papers in that action, but we were advised that their file in that action was destroyed by them prior to 1927.

In the second action Donna del Drago was represented by the then firm of Bowers & Sands. The matter was handled by John M. Bowers and later by his son, Spotswood D. Bowers. We have not communicated with Laughlin, Gerard, Bowers & Halpin, the successor to the firm of Bowers & Sands, because we desire to avoid any additional expense, if possible. However, if you desire that we do so, we can require Laughlin, Gerard, Bowers & Halpin to examine their records and see what papers they have. It is possible that they have the important papers in connection with both of these actions.

Will you kindly bring with you the printed volumes to which you refer in your letter and any other papers that you may be able to find. We note that you say that some papers may be in the Manhattan Storage Warehouse Company.

We assure you that we will keep you advised as to how this matter progresses.

In your recent letters we notice that our address is given as No. 207 Madison Avenue instead of No. 270 Madison Avenue, which is the correct address.

Very truly yours, Grant & Clark.

LF:RO.

[fol. 63] EXHIBIT 12

Decedent's Will Dated August 19, 1907

I, Josephine Schmid, of the Borough of Manhattan, in the City, County and State of New York, do hereby make, publish and declare this to be my last Will and Testament.

. . . . . .

Second: All my estate, real, personal and mixed and wheresoever situate I hereby give, devise and bequeath unto my friends Morgan J. O'Brien, lawyer, Algernon S. Frissell, President of the Fifth Avenue Bank of New York, and George E. Mott, lawyer, all of the Borough of Manhattan, New York City, and the survivors and survivor of them, To Have and To Hold the same in Trust, however, for the following uses and purposes, to wit: to collect the rents, income, interest, dividends and revenue of the said estate, and * * * to pay over the net semi-annual income of my said estate to my daughter Pauline Murray, wife of Hugh A. Murray, of the Borough of Manhattan, New York City, during the term of her natural life, and upon her death to apply said net semi-annual income * * * to the support, maintenance and education of my grand-daughter Pauline) Josephine Murray, daughter of my said daughter Pauline Murray, until my said grand-daughter shall attain the age of twenty-one years, and upon my said grand-daughter attaining the age of twenty-one years, to pay over to her any unexpended income then on hand, and thereafter the entire net income of said estate until she shall attain the age of forty years, and upon her attaining [fol. 64] the age of forty years, I give, devise and bequeath unto my said grand-daughter all my estate, real, personal and mixed, To Have and To Hold the same to her and her assigns forever. * * * It is my will, however, that my daughter Pauline Murray shall have the use free of rent during the term of her natural life of my city residence No. 807 Fifth Avenue, in the Borough of Manhattan, City of New York, and my country residence at South Broadway, in the Village of Tarrytown, Westchester County, New York, and likewise of the premises No. 988 Fifth Avenue in the Borough of Manhattan, New York City, together with all the paintings, pictures, bric-a brac, articles of vertu, silver, plate, rugs, statuary, household utensils and furniture and furnishings of every description belonging to me contained therein.

* * * * * * *

Sixth: I hereby nominate and appoint my said friends Morgan J. O'Brien, Algernon S. Frissell and George E. Mott to be the executors of this my last Will and Testament.

In witness whereof, I have hereunto subscribed my name and affixed my seal to this my last Will and Testament this

nineteenth day of August, in the year of our Lord, One thousand, nine hundred and seven.

Josephine Schmid (L. S.).

Witnesses: Edw. J. Dwyer, Rudolph Albert and Gustave F. J. Amther.

[fol. 65] EXHIBIT 14

Decedent's Will Dated August 3, 1909

In the name of God, amen:

I, Josephine del Drago (formerly Josephine Schmid, wife of Giovanni del Drago, of the Borough of Manhattan, in the City, County and State of New York, do hereby make, publish and declare this to be my Last Will and Testament.

* * * * * * *

And whereas, under a certain written or printed agreement between my daughter Pauline Murray and myself, bearing date the 18th day of May, 1909, a duplicate original of which is deposited with the Farmers Loan and Trust Company of the City of New York, I have obligated myself to pay to my said daughter, or for her benefit, Several hundred thousands of Dollars, now in case I shall die before all of said payments shall have been made, I hereby direct my executors to make such payments as shall remain unpaid at the time of my death, under the provisions of said agreement.

Second: I hereby give and bequeath unto my granddaughter Pauline Josephine Murray, daughter of my daughter Pauline Murray, the sum of Fifty thousand Dollars ($50,000).

* * * * * * *

Ninth: I hereby give and bequeath unto my Executors, hereinafter named, and the survivor of them, the sum of Two hundred thousand Dollars ($200,000), To have and To hold the same, In Trust, however, for the following uses and purposes, to wit: To invest the same and keep the same invested, and pay over the net semi-annual income thereof, unto my beloved husband Giovanni del Drago, during the term of his natural life, and upon his death, I give and

[fol. 66] bequeath the sum so to be held in trust, unto Marcel Gentili, of Florence, Italy, son of my said husband by a former wife, To have and To hold the same forever.

. . . . . .

Eleventh: I have purposely refrained from making any provision in this Will for my daughter Pauline Murray, for the reason, among others, that under and by virtue of the Agreement mentioned in that paragraph of this Will, marked and numbered "First," she has received, and will receive from me, or there will be expended by me for her benefit, a very large sum of money, and upon my death, she will become the absolute owner of the entire capital stock of the corporation Lion Brewery, of New York City, worth Several millions of Dollars, and I feel that she has already been amply provided for, and that in consideration of that situation, and the suit which she instituted against me in the Supreme Court, I am at liberty to dispose of my property as I have done in this Will.

Twelfth: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situated, I hereby give, devise and bequeath unto my beloved husband Giovanni del Drago, To have and To hold the same forever.

. . . . . .

In witness whereof, I have subscribed my name and affixed my seal to this my Last Will and Testament, this third day of August, in the year of our Lord, Nineteen hundred and nine.

Josephine del Drago (L. S.)

Witnesses: Frederick E. Grant, Jno. R. Walett and Wm. H. Leupp.

[fol. 67] EXHIBIT 18

Decedent's Will, Dated June 6, 1918

In the Name of God, Amen.

I, Josephine del Drago (formerly Josephine Schmid), wife of Giovanni del Drago, of the Borough of Manhattan, City of New York, in the State of New York and United

States of America, do hereby make, publish and declare this to be my Last Will and Testament:

* * * * * * *

Fifth: I hereby give and bequeath unto the Equitable Trust Company of New York, * * * the sum of Two hundred thousand Dollars ($200,000.), *To have and To hold* the same, *In Trust, however,* for the following uses and purposes, to wit: To invest the same and keep the same invested and pay over the net semi-annual income thereof unto my beloved husband, Giovanni del Drago, during the term of his natural life, and upon his death, to pay over the net semi-annual income of said trust fund unto Marcel Gentili, * * * son of my said husband by a former wife, during the term of his natural life, and upon the death of my said husband and his said son I give and bequeath the principal sum of Two hundred thousand Dollars ($200,000) so to be held in trust unto the lawful issue of said Marcel Gentili, if any he shall have, him surviving, to be divided between them equally per stirpes and not per capita.

* * * * * * *

Sixth: All the rest, residue and remainder of my estate, real, personal and mixed and wheresoever situated, I hereby give, devise and bequeath unto my beloved husband, [fol. 68] Giovanni del Drago, To have and To hold the same unto him and his heirs and assigns, forever.

* * * * * * *

Seventh: I purposely refrain from making any provision in this Will for my daughter, Pauline Murray, for the reason, among others, that under and pursuant to the provisions of a written agreement between her and myself bearing date the 18th day of May, 1909, and which settled a law suit which was brought against me in the Supreme Court, she received from me a large amount of property, and upon my death it was provided that she should become the absolute owner of the entire capital stock of the corporation Lion Brewery of New York City, and since the making of said agreement she brought another suit against me in the Supreme Court of the State of New York in settlement of which she received on the 9th day of April, 1918, instead of at my death, the entire capital stock of the said corporation, Lion Brewery of New York City, freed from any right or interest I had therein, which corporation has

assets of several millions of dollars over and above its liabilities, and I feel that she has been amply provided for and that I am at liberty to dispose of my property as I have done in this Will.

* * * * * * *

In witness whereof I have subscribed my name and affixed my seal to this my Last Will and Testament this sixth day of June in the year of our Lord nineteen hundred and eighteen.

Josephine del Drago (L. S.).

Witnesses: Francis M. Scott, Spotswood D. Bowers and Frederick E. Grant.

[fol. 69] EXHIBIT 19

Codicil to Decedent's Will of June 6, 1918, Dated May 9, 1932

I, Josephine del Drago (formerly Josephine Schmid), wife of Giovanni del Drago, of the Borough of Manhattan, City of New York, in the State of New-York, and United States of America, being of sound and disposing mind and memory, having made my Last Will and Testament bearing date the 6th day of June, one thousand nine hundred and eighteen, do now make this Codicil to be taken as part of the said Last Will and Testament.

First

I hereby ratify and confirm my said Last Will and Testament in every respect except in so far as any part of said Last Will and Testament is inconsistent with this Codicil.

* * * * * * *

Fifth

* * * * * * *

Now, I do hereby revoke the said Fifth Paragraph of my said Last Will and Testament, * * * and substitute in lieu and place thereof the following provisions:

In the event that Marcel del Drago Gentili, son of my beloved husband by a former wife, shall survive me, I

hereby give and bequeath unto Central Hanover Bank and Trust Company, a Banking Corporation, now having its principal office at No. 70 Broadway, Borough of Manhattan, New York City, the sum of One hundred and fifty thousand ($150,000) Dollars, to have and to hold the same, In Trust, however, for the following uses and purposes, to wit: [fol. 70] To invest the same and keep the same invested and pay over the net income thereof unto my beloved husband, Giovanni del Drago, during the term of his natural life, and upon his death, or at my death, if my said husband shall not survive me, to pay over the income thereof to said Marcel del Drago Gentili * * *.

* * * * * * *

Sixth

Whereas, under the Sixth Paragraph of my said Last Will and Testament, I have made provision for the disposition of my residuary estate

* * * * * * *

Now, I hereby revoke the said Sixth Paragraph, above set forth, of my said Last Will and Testament and substitute in lieu and place thereof the following provisions:

All the rest, residue and remainder of my estate, real, personal and mixed, * * * I hereby give, devise and bequeath unto my beloved husband, Giovanni del Drago, to have and to hold the same unto him and his heirs and assigns forever.

In the event, however, that my said husband shall not be living at the time of my death, then and in that event, I give, devise and bequeath my said residuary estate as follows, to wit:

(a). To Don Urbano del Drago, if living at the time of my death.

(b) If said Urbano del Drago be not then living, to his first born son, if then living.

[fol. 71] (c) If neither said Urbano del Drago nor his first born son be then living, then to the first born son of his first born son, if then living.

(d) If none of those described in (a), (b) and (c) above shall be then living, then to that one of the male issue of

said Urbano del Drago who would then be considered as his representative in the male line according to the principle of primogeniture.

(e) If neither said Urbano del Drago nor any descendants of his in the male line be then living, then in equal parts to the then living issue of said Urbano del Drago, per stirpes.

(f) If neither said Urbano del Drago nor any of his issue be then living, I give, devise and bequeath my said residuary estate to Clemente del Drago and Mario del Drago, sons of Luigi del Drago, share and share alike, if they are both then living; and if one or both of said sons of Luigi del Drago shall not be then living, I give, devise and bequeath my said residuary estate to such of said sons of Luigi del Drago as shall then be living and the then living issue of such of them as shall have died leaving issue, per stirpes and not per capita, said issue to receive the share to which their parents would have been entitled if living.

* * * * * * *

Eighth

Whereas, my daughter, Pauline Murray, has died subsequent to the execution of my said Last Will and Testament, [fol. 72] I hereby revoke the Seventh Paragraph of my said Last Will and Testament.

* * * * * * *

In Witness Whereof, I have hereunto subscribed my name at the end hereof and affixed my seal to this Codicil to my Last Will and Testament, dated the 6th day of June, 1918, this 9th day of May, Nineteen hundred and thirty-two.

Josephine del Drago (L. S.).

Witnesses: Byron Clark, Jr., Littleton Fox and Robert T. Hawthorne.

[fol. 73] EXHIBIT 20

Decedent's Will Dated October 30, 1933

In the Name of God, Amen!

I, Josephine del Drago (formerly Josephine Schmid) wife of Giovanni del Drago, being a citizen of the United

States and a resident of the Borough of Manhattan in the City, County and State of New York, United States of America, and being of sound and disposing mind, memory and understanding, and knowing and appreciating the uncertainty of life, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any former wills or codicils thereto by me at any time made.

* * * * * * *

Fifth: I give and bequeath to Paula Murray Coudert of the City, County and State of New York, my diamond tiara, to be hers absolutely and forever.

Sixth: I give and bequeath to my beloved husband, Giovanni del Drago, all my paintings, statuary, jewelry, furniture, silver, household and personal effects, to be his absolutely and forever.

Seventh: I give and bequeath the sum of Three hundred thousand ($300,000.00) Dollars to my beloved husband Giovanni del Drago, to be his absolutely and forever.

Eighth: I give and bequeath to Marcel Gentili the sum of Two hundred thousand ($200,000.00) Dollars, to be his absolutely and forever.

[fol. 74] Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, and wheresoever situated, * * * I give, devise and bequeath to the Corn Exchange Bank Trust Company, * * * In Trust, however, to invest the same and collect the rents, issues and profits therefrom, and to apply the same for the use, maintenance and support of my beloved husband, Giovanni del Drago during the term of his life, and upon his death I direct my trustee to pay over the principal of said estate to Marcel * * * son of my said husband by a former wife, and in case said Marcel Gentili shall then be dead but shall leave children or issue of children surviving, in that case I direct that the principal shall be divided in equal shares among such children and issue *per stirpes;* and in the event that said Marcel Gentili shall be dead and leave no children or issue then surviving, then and in that case I direct that the principal shall be paid over to Luigi del Drago, and should he also be then dead but leave children or issue of children surviving, then and in that case I direct

that the principal shall be divided in equal shares among such children and issue of children *per stirpes*.

* * * * * * *

In witness whereof I have hereunto subscribed my name at the end hereof, and affixed my seal on this 30th day of October in the year of our Lord Nine hundred and thirty-three.

Josephine del Drago. (Seal.)

Witnesses: Frank C. Laughlin, James W. Gerard, Spotswood D. Bowers and Walter G. Zorn.

[fol. 75] EXHIBIT 21

Decedent's Will Dated March 27, 1934 Admitted to Probate Herein

In the Name of God, Amen!

I, Josephine del Drago (formerly Josephine Schmid) wife of Giovanni del Drago, being a citizen of the United States and a resident of the Borough of Manhattan, in the City, County and State of New York, United States of America, and being of sound and disposing mind, memory and understanding, and knowing and appreciating the uncertainty of life, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any former wills or codicils thereto by me at any time made.

First: I direct my executors hereinafter named to pay all my just debts and funeral expenses as soon after my death as is practical.

Second: I give and bequeath unto the person who at the time of my death shall be Archbishop of the Roman Catholic Church for the Diocese of New York the sum of One thousand ($1,000.00) Dollars.

Third: I give and bequeath unto the Columbus Hospital at No. 227 East 19th Street, Borough of Manhattan, City, County and State of New York, the sum of Two thousand ($2,000.00) Dollars.

Fourth: I give and bequeath unto my friend George E. Mott of F.. Rockaway, Borough of Queens, New York County, and my friend Frederick E. Grant of 67 Wall Street, [fol. 76] Borough of Manhattan, New York City, the sum of Two thousand five hundred ($2,500.00) Dollars each, as a token of my friendship and appreciation of faithful services rendered to me by them.

Fifth: I give and bequeath to Paula Murray Coudert of the City, County and State of New York, my diamond tiara, to be hers absolutely and forever.

Sixth: I give and bequeath to my beloved husband, Giovanni del Drago, all my paintings, statuary, jewelry, furniture, silver, household and personal effects, to be his absolutely and forever.

Seventh: I give and bequeath the sum of Three hundred thousand ($300,000.00) Dollars to my beloved husband Giovanni del Drago, to be his absolutely and forever.

Eighth: I give and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, the sum of Two hundred thousand ($200,000.00) Dollars, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of Marcel del Drago of Rome, Kingdom of Italy, son of my husband by a former marriage, during the term of his life, and upon his death I direct my trustee to pay over the principal of said estate in equal shares *per stirpes* to his children born in lawful wedlock, and/or the children born in lawful wedlock of any such child who shall then be deceased. By the term "lawful wedlock", as used throughout this will, I intend to exclude an adopted or [fol. 77] legitimatized child as well as an illegitimate child. In the event that Marcel del Drago shall leave no such children or such children of such children, then and in that event I direct my trustee to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock to Clemente del Drago, son of Luigi del Drago, a brother of my husband, Giovanni del Drago and/or the children born in lawful wedlock of any such child who shall then be deceased.

Ninth: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated, and includ-

ing any and all property over which I have power of appointment, and including all lapsed legacies, I give, devise and bequeath to the Corn Exchange Bank Trust Company, 13 William Street, Borough of Manhattan, City, County and State of New York, In Trust, however, to invest the same and collect the rents, issues and profits therefrom and to apply the same for the use, maintenance and support of my beloved husband Giovanni del Drago of Rome, Kingdom of Italy, if he shall survive me, during the term of his life, and upon his death, or at my death if he shall have predeceased me, I direct my trustee and/or executors, as the case may be, to pay over the principal of said estate in equal shares *per stirpes* to the children born in lawful wedlock of Mario del Drago, second son of Luigi del Drago, of Rome, Italy, a brother of my husband, and/or the children born in lawful wedlock of any such child which may then be deceased, to be theirs absolutely and forever.

[fol. 78] Tenth: In the event that my said husband and I shall die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will and that it shall be deemed that I have predeceased my said husband, and that my will and any and all provisions contained therein shall be construed on the assumption and basis that I shall have predeceased my husband.

Eleventh: I direct that my executors and trustee shall have full power and authority in their absolute discretion to hold and retain any or all of the stocks, bonds, mortgages, securities or any other property, real or personal, in which my estate or any part thereof may be invested at the time of my death, or which may at any time be received by my executors and/or my trustee without regard to whether the same shall be of the class of investments permitted by law for trustees' investments, and to invest and reinvest the assets from time to time constituting my estate in such real property, mortgages, stocks, bonds or other securities as they may deem advisable without the legal restrictions applicable to trustees.

My executors and trustee are hereby authorized and empowered in their absolute discretion to sell, at public or private sale, to mortgage, pledge or lease for such prices and upon such terms and conditions as may to them seem

advisable, any part or all of the property, real, personal or mixed, of which I may die seized or possessed, or in which my estate may be at any time invested.

Twelfth: I authorize my executors and trustee, and my executors and trustee are hereby granted full power and [fol. 79] authority, to enter into agreements of reorganization, merger or dissolution of any corporation in which they may at any time hold stock, bonds or notes or other securities, and in case thereof to surrender the stock, bonds, notes or other securities of said company and accept in exchange thereof stocks of the reorganized or merged companies, or bonds or notes thereof or other real or personal property; and said executors and trustee shall have power to pay any and all expenses or disbursements which they may incur in connection with such reorganization, merger or dissolution, including the payment of any assessment, whether same be for the purpose of purchasing securities in the reorganized company or not; and said executors and trustee shall also have power at any time to join any stockholders' protective committee of any company in which they may then own stock, bonds or notes for the protection of the interest of the estate hereby transferred, and to pay their proportionate share of the expenses of such committee.

I also authorize my said executors and trustee to make advances for the protection of any securities held by them or to secure any rights or options given thereunder, and I hereby authorize my said executors and trustee to make said advances from the trust funds held by them as an investment of the same.

Thirteenth: My executors and trustee shall also have the power

(a) to exercise any rights to subscribe for securities in [fol. 80] corporations in which the funds of the estate may then be invested, whether same be in the character of investments herein authorized for the reinvestment of the funds of the estate or not;

(b) to vote in person or by proxy upon all stocks or other securities held by them;

(c) to exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities;

(d) to treat as income all extraordinary cash dividends and all dividends on stock of mining and oil companies paid out and representing in whole or in part depletion of reserves. Stock dividends, except current dividends paid in stock in the regular course of business, liquidating dividends and rights to subscribe to stock of the corporation declaring such dividends or issuing such rights shall be treated as principal of the estate. The decision of the executors and/or trustee as to whether any dividends or rights are capital or income, or partly capital and partly income, shall be conclusive and binding upon all parties interested in the estate;

(e) to make any division or distribution of the funds of the estate, or any part thereof, in kind or in money or partly in kind and partly in money; to allot any property, including an undivided interest therein, to any share, whether or not the same or a different kind of property is allotted to other shares, and in connection with any such division or distribu- [fol. 81] tion the determination of the executors and/or trustee as to values shall be final and conclusive.

Fourteenth: I further direct that my executors may in their discretion, instead of selling the securities of my estate for the purpose of setting up the various trust funds, turn over to the trustee property in kind at a valuation which, in the judgment of my executors, is equal to the amount of the trust fund established, and I direct that their valuation and choice of securities shall be final and conclusive.

Fifteenth: I hereby nominate, constitute and appoint my said husband, Giovanni del Drago, and my friend, Frederick E. Grant, to be the executors of my Last Will and Testament, and I direct that they shall not be required to furnish bonds for the faithful performance of their duties.

Sixteenth: If either said Giovanni del Drago or said Frederick E. Grant shall for any reason fail to qualify as such executor, or shall die before or after qualifying, or shall resign, renounce or be removed, then and in every or any such event I nominate, constitute and appoint Byron Clark as an executor of this my Last Will and Testament, and I direct that he shall not be required to furnish bond for the faithful performance of his duties, and in the event of his qualifying as such executor said Byron Clark shall

have and possess all the powers and privileges herein given to my executors named herein; and I further direct that if both said Giovanni del Drago and Frederick E. Grant shall for any reason fail to qualify as such executors or shall die either before or after qualifying, or shall resign, re- [fol. 82] nounce or be removed, then and in every or any such event I nominate, constitute and appoint D. Gordon Jones, Assistant Manager of the Park Avenue Branch of Corn Exchange Bank Trust Company, at 52nd Street and Park Avenue, Borough of Manhattan, City, County and State of New York, as an executor of this my Last Will and Testament, and I direct that he shall not be required to furnish bond for the faithful performance of his duties, and in the event of qualifying as such executor said D. Gordon Jones shall have and possess all the powers and privileges herein given to my executors. In the event that at any time after the above have qualified or refused to qualify, or having qualified shall cease to act for any reason as executors, so that there shall be but one executor, then and in that event, and as often as the same shall occur, the remaining executor shall have the right to appoint by designation in writing a successor executor, and should there be at any time no remaining executor, then and in that event the executor or executors, administrator or administrators, as the case may be, of the estate of the last acting executor, shall have the right to appoint a successor executor, and any executor so appointed shall have all the rights and powers given to the executors named in this Will, but an executor so appointed shall be required to give the statutory bond.

In Witness Whereof I have hereunto subscribed my name at the end hereof, and affixed my seal on the 27th day of March in the year of our Lord nineteen hundred and thirty-four.

Josephine del Drago.

Witnesses: Frank C. Laughlin, James W. Gerard and Spotswood D. Bowers.

[fol. 83] In Surrogate's Court, County of New York

Opinion

The issues in this contested accounting proceeding are disposed of as follows:

(1) Two of the beneficiaries of this estate named in the will of the testatrix, which was executed in New York, assert that any apportionment of the federal estate tax made pursuant to the provisions of section 124, Decedent Estate Law, is violative of certain articles of the federal and state constitutions.

The surrogate overrules all such objections to the constitutionality of the statute and to the equitable proration of the tax to be made in this estate against the respective interests of all the beneficiaries named in the will. Reliance for this conclusion might be based alone upon the authority of Matter of Scott (158 Misc., 481, aff'd 249 App. Div., 542, aff'd 274 N. Y., 538, certiorari denied sub nom. Northwestern Mutual Life Ins. Co. v. Central Hanover Bank & Trust Co., 302 U. S., 721). In that case general grounds of the unconstitutionality of the statute were raised. Specifically it was also asserted that section 124, Decedent Estate Law, had been unduly extended in its scope to permit the apportionment of the tax against the insurance company and the beneficiaries of insurance policies, the proceeds of which had been included in the net taxable estate. The apportionment involved both the federal and New York State estate tax. Mr. Surrogate Delehanty, in his opinion, reviewed the plan of the new section and the applicable federal authorities, and sustained its complete validity. His decision was affirmed by the appellate courts of our state, and certiorari was denied by the United States Supreme Court. In Matter of Kaufman (170 Misc., 436) and Matter [fol. 84] of Ryle (170 Misc., 450) further discussion of the legality of the section was made and the conclusion of constitutionality reiterated. No appeal was taken from either of those decisions.

In the pending proceeding no question of the proration of the tax upon insurance moneys or upon transfers made inter vivos, which might have been included in the net taxable estate, is involved. If such question had arisen necessarily the determination reached in Matter of Scott (supra) would

have destroyed any foundation for a contention against the right of apportionment. But the disposition of a proration as against the beneficiaries named in the will, such as is here involved, is even simpler of understanding. The property passes at death by virtue of a privilege granted by the State of New York. That privilege extends not only to the making of the will, but also to the imposition of an estate tax upon the succession, plus power in the Legislature to declare what persons shall bear the burden of the federal and state tax. So far as the words of the federal statute are concerned, "the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter." (Hough, J., in Edwards v. Slocum, 287 Fed. Rep., 651, 653, aff'd, without opinion, 264 U. S., 61.) To that statement may be added, where the Legislature has provided the method of apportionment of either or both of the taxes, as an incident to the privilege of inheritance, the courts must apply and enforce the statutory rules.

[fol. 85] Subsequent decisions of the federal courts have reaffirmed the right of the state of the domicile of the testator to provide for the distributions or allocation of the federal estate tax (Young Men's Christian Association v. Davis, 264 U. S., 47, 51; Hepburn v. Winthrop, 83 Fed. [2d], 566). Once the tax is levied and paid to the United States Government, its interest in the source of payment terminates. The states may adopt varying rules. New York, in its legislation, has chosen to apply a rule based upon justice and equity. It has permitted the testator to say where the burden of the tax shall fall, by an appropriate direction in his will or in the inter vivos indenture. In the absence of any such direction, the burden of the tax is laid against each of the beneficiaries proportionately to the pecuniary advantage received.

The objectants, who assert unconstitutionality here, cite statements in opinions of the Court of Appeals rendered prior to the enactment of section 124, Decedent Estate Law, in Matter of Hamlin (226 N. Y., 407) and in Matter of Oakes (248 N. Y., 280). These statements have not the slightest application to the changed situation created by the new section, which took effect on September 1, 1930. The legislation had been drafted and its passage recom-

mended by the Decedent Estate Commission. Its purpose was fully set forth in the note printed with the bill (Combined Reports of the Decedent Estate Commission, page 338). That note was indicative of the legislative intent. In it the hardship of the then existing rule, which imposed the full burden of the federal and state tax upon the residuary legatees, was stressed. Matter of Hamlin (supra) and Matter of Oakes (supra) were cited in the note as well [fol. 86] as the decision of Judge Hough in Edwards v. Slocum (supra). The note recited, "that each state is at liberty to determine according to its own laws in what manner the federal estate tax shall be borne by the persons interested in the estate." All existing rules as to the specific source of payment of the tax were thus intended to be changed by the new section, which provided for equitable allocation, unless the will specifically directed a different form of imposition of the tax. When the section was enacted the Legislature must be presumed to have known what interpretation had theretofore been put upon the statutes by the courts. It was charged with knowledge of existing legal principles which, in framing the statute, it desired to alter and improve. "The general rule, as I understand it, is that when the legislature amends or enacts anew a statute it will be assumed that it had full knowledge of all the judicial decisions theretofore made interpreting the statute as then existing, and that being so, the new enactment must be read in the light of such previous interpretation" (McLaughlin, J., in Matter of Cole, 235 N. Y., 48, 53, citing, Orinoco Realty Co. v. Bandler, 233 N. Y., 24; Komada & Co. v. United States, 215 U. S., 392; Caesar v. Bernard, 156 App. Div., 724, affirmed 209 N. Y., 570).

It should also be noted that the provisions of section 124, Decedent Estate Law, were made expressly applicable to the estates of persons dying after August 31, 1930. The testatrix here made her will in 1934; she died on October 8, 1937. It was her privilege to direct what parts of her estate or what persons should bear the burden of the tax. Her will is silent in that respect. She is presumed, therefore, to have drawn her will with knowledge that the statute [fol. 87] providing for an equitable apportionment of the taxes would apply to it.

No federal question nor any ground of unconstitutionality, therefore, attaches to the provisions of section 124, Decedent Estate Law, nor to the method of the equitable ap-

portionment of the tax made pursuant to its terms. The objecting beneficiaries must bear their fair portion of both the federal and state tax assessed upon the passing of the decedent's property.

* * * * * * *

(4) The surrogate holds that the will of the decedent executed by her and established in the Republic of France, by which she disposed of all of her property in that country to her husband, constituted a separate and independent disposition from the provisions contained in her last will admitted to probate in New York. A similar determination is made as to the will executed by her and established in the Kingdom of Italy. The executors in New York are relieved from and are exempt from any responsibility for the collection or administration of the assets either in France or in Italy. Each of these three wills affected only the properties and assets within the respective jurisdiction. Moreover, the instruments themselves and the extrinsic evidence establish that the general clause of revocation of prior wills contained in the New York will, did not revoke nor in any manner affect the French or Italian will of the testatrix. In this respect the decision of the Court of Appeals in Matter of Smith (254 N. Y., 283) is a controlling authority. A similar conclusion, that instruments affecting the dis- [fol. 88] position of property in two jurisdictions were separate and independent of each other, was reached by me in Matter of Levy (174 Misc., 923).

* * * * * * *

(9) The objection to the payment to Mr. Wilson for expenses in connection with foreign assets in the sum of $930, as set forth in Schedule C of the account, is sustained, and that amount is surcharged against Mr. Del Drago, the co-executor, for whose individual benefit the expenditure was made. The disallowance of that item is necessarily based upon the surrogate's determination that neither the executors' accounting here nor the attorney for one of them had any responsibility for the supervision or collection of the foreign assets either in France or in Italy.

* * * * * * *

Submit decree on notice settling the original and supplemental accounts, in accordance with this decision and any

additional instructions given by the surrogate at the hearing held on June 25, 1940. Such decree may contain a reservation for the submission of a supplemental confirmatory decree after the service and return of the supplemental citation as to the additional infant party recently brought into the proceeding. The special guardian for such infant is instructed to file a supplemental report after the return of such citation and before the entry of the supplemental decree.

[fol. 89] STIPULATION WAIVING CERTIFICATION

It is stipulated that the foregoing record comprises true and correct copies of the notice of appeal, the decrees from which the appeal is taken and the decision upon which said decrees were made, and true and correct extracts from the account, the pleadings, the minutes of the hearing, the exhibits marked in evidence thereon and all papers used in the Court below, on file in the office of the Clerk; and certification thereof is hereby waived.

Dated, New York, March —, 1941.

Ludwig M. Wilson and Robert W. Maloney, Attorneys for Appellants. Grant, Clark & Fox, Attorneys for Respondent, Byron Clark, Jr., as Executor. Lawrason Riggs, Jr., Special Guardian Respondent. Harold W. Hastings, Special Guardian Respondent. Laughlin, Gerard, Halpin & Graham, Attorneys for Respondent-Trustee, Corn Exchange Bank Trust Co.

[fol. 90] STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of Giovanni del Drago and Byron Clark, Jr., as Executors of Josephine del Drago, Deceased, decided by the Court of Appeals on the twenty-seventh day of November, 1941, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this ninth day of February, 1942.

Louis J. Rezzemini, As Reporter of the Court of Appeals of the State of New York.

Attest: (L. S.) John Ludden, Clerk of the Court of Appeals. (Seal.)

STATE OF NEW YORK,
Court of Appeals:

I, Irving Lehman, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of Giovanni del Drago and Byron Clark, Jr., as Executors of Josephine del Drago, Deceased, decided by the said Court of Appeals on the twenty-seventh day of November 1941, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of

Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on the 16 day of February in the year one thousand nine hundred and forty-two.

Irving Lehman, as Chief Judge of the Court of Appeals of the State of New York.

[fol. 91] In the Matter of the Accounting of GIOVANNI DEL DRAGO and Byron Clark, Jr., as Executors of Josephine Del Drago, Deceased

GIOVANNI DEL DRAGO, Individually and MARCEL DEL DRAGO, Appellants; Byron Clark, Jr., as Executor, et al., Respondents

(Decided November 27, 1941)

Appeal to the Court of Appeals by legatees from an order and decree of the Surrogate's Court, New York County, (Foley, J.) settling the accounts of the trustee and directing payment of federal estate taxes out of the shares of the individual legatees.

Henry Cohen, Ludwig Wilson and *Robert W. Maloney* for appellants.

Lawrason Riggs, Jr., for Angela del Drago et al., respondents.

Littleton Fox and *Anthony J. Caputo* for Byron Clark Jr., as executor, respondent.

Harold W. Hastings and *Sydney A. Hellenbrand* for Harold W. Hastings, as special guardian, respondent.

RIPPEY, J.:

Josephine del Drago died October 8, 1937, while a resident of New York State, leaving a last will and testament dated March 27, 1934, which was probated by the Surrogate of New York County, and Giovanni del Drago

and Byron Clark, Jr., were appointed and thereupon qualified as executors of her estate. Upon an accoun-ing by the executors to which all parties interested in the estate were parties, it appeared that although no final determination has been made as to the amount of state and federal estate taxes properly assessable, the executors have already paid nearly $300,000 thereon out of the general assets of the estate. Before distribution to beneficiaries, the executors properly requested a determination of the question of whether the taxes so paid should be apportioned to, prorated among and deducted from the shares passing under the will to the several legatees and devisees or paid entirely from the remainder residuary estate.

The deceased left a substantial estate in the United States and also property in France and Italy which latter is not the subject-matter of this accounting or involved in the point to be decided. Following small specific legacies for various persons, the deceased left to her husband, Giovanni del Drago, who is domiciled in the United States, various articles of personal property and effects by the *sixth* clause of the will, the sum of $300,000 by the *seventh* clause and the life use of the residuary estate under the *ninth* clause of the will. By the *eighth* clause of the will, she left to her stepson, Marcel del Drago of Rome, Italy, [fol. 92] the life use of $200,000 with remainder over, *per stirpes*, to his surviving children born in lawful wedlock and/or the children born in lawful wedlock of any such child of her stepson who should then be deceased. In the event that Marcel del Drago should leave no such children or such grandchildren surviving, the remainder was directed to pass to the children of Clemente del Drago, son of Luigi del Drago, a brother of her husband, born in lawful wedlock and/or to the children born in lawful wedlock of any deceased child or children. By the *ninth* clause of the will, the residue of the estate upon the death of her husband was to pass to the children born in lawful wedlock of Mario del Drago, the second son of Luigi del Drago, of Rome, Italy, and/or the children born in lawful wedlock of any such child who might then be deceased.

The will contains no direction as to how, by whom or out of what portion of her estate so devised and bequeathed the estate taxes should be paid. By objections and answer to the account, specific legatees and guardians for infant legatees have suitably put in issue the constitutionality of

chapter 709 of the Laws of 1930 (Decedent Estate Law, § 124 [Cons. Laws, ch. 13]) and chapter 710 of the Laws of 1930 as amended (Tax Law § 249-t of the Tax Law [Cons. Laws, ch. 60]) in so far as such statutes or either of them provide for the imposition, assessment or apportionment of the federal estate tax or any portion thereof against their legacies or interests in the estate of deceased. It is alleged that those acts of the New York State Legislature are violative of the provisions of article I, section 8, and article VI of the Constitution of the United States and of the Fourteenth Amendment thereto and in conflict with and in violation of the provisions of the Federal Estate Tax Law, being title III of the Revenue Acts of 1926 and 1932, as amended by the Revenue Acts of 1935, 1936 and 1938 as amended, and known as section 826 (b) of the United States Revenue Code (U. S. Code, tit. 26, § 826, par. [b]) and are consequently void. The Surrogate overruled the objections and ordered and adjudged that the executors apportion and prorate all estate taxes, whether federal or state, among the various persons who take under the will in accordance with state law. By direct appeal by Giovanni del Drago and Marcel del Drago from the final order of the Surrogate, the constitutional question is properly before this court. The question propounded which we consider is whether the State of New York may by statute regulate and determine the incidence of the federal estate taxes in the face of the uniformity, supremacy and due process clauses of the Federal Constitution and of a contrary congressional intent.

Article I of the Federal Constitution contains the uniformity clause and provides that "the Congress shall have [fol. 93] Power To lay and collect Taxes, Duties, Imposts and Excises * * *; but all Duties, Imposts and Excises shall be uniform throughout the United States * * *" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (§ 8). Article VI contains the supremacy clause and reads in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Section 1 of the Fourteenth Amendment to the Constitution provides, among other things, that "all persons born or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Prior to the act of 1916, all federal acts imposing death duties made specific provision for the payment of the tax by the several legatees individually and severally out of their shares and not by the estate (1 U. S. Stat. 527, July 6, 1797; 12 U. S. Stat. 433, 485, 486, July, 1862; 13 U. S. Stat. 223, 285-291, June, 1864; 30 U. S. Stat. 448, 464-466, June, 1898, as amended by 31 U. S. Stat. 946, [1901]). They were emergency measures and made no provision for permanent excises. They provided for inheritance taxes and not estate taxes. A reading of the 1898 act would seem to indicate that the rate was based on the net estate but the individual legacies were taxed. The constitutionality of that scheme of death-duty taxation was sustained only by construction whereby it was held that the rate was fixed alone by the size of the legacy (*Knowlton* v. *Moore*, 178 U. S. 41). By 1916, forty-two states (including the State of New York) were imposing death duties upon individual beneficiaries of decedent's estates. In no case was such imposition an estate tax. They were all strictly inheritance taxes and so defined. Never before 1916, except as emergency measures, had the federal government invaded the field of inheritance taxation which the states considered their exclusive preserve. The proposal of Congress to tap that field for additional revenue met powerful opposition by the states with the result that political expediency and practical and constitutional considerations impelled Congress to abandon that idea and turn to a tax upon the net estate as a unit of taxation, a new and hitherto unused source of federal revenue, and leave the imposition of a tax upon the separate successions to the [fol. 94] property of each legatee or distributee to the several states (Congressional Record, 64th Congress, vol. 53, pt. 11, particularly at p. 10657, and pt. 15, Appendix, pp. 1495, 1942; *Matter of Hamlin*, 226 N. Y. 407; *Matter of Sherman*, 179 App. Div. 497; affd., 222 N. Y. 540; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 63; Gleason & Otis on The Law of Inheritance Taxation [4th ed., 1925],

pp. 7-19). The federal estate tax as then proposed and subsequently developed was fundamentally different from a state inheritance tax (*Knowlton* v. *Moore, supra*). The distinction is pointed out and the authorities reviewed in *Farmers Loan & Trust Co.* v. *Winthrop* (238 N. Y. 488) and in *Y. M. C. A.* v. *Davis* (*supra*) and needs no further elaboration or discussion here. The theory of the federal estate tax is that the transfers are part of the estate and the tax thereon must be paid by the executor before distribution without recourse to the beneficiary (*Farmers Loan & Trust Co.* v. *Winthrop, supra*). Congress decided that a net estate tax was the one that it could adopt for a permanent part of its tax system with greater political and constitutional safety by leaving estate share taxes (inheritance taxes) to the states and estate taxes to the federal government. Thus, it was found, there would be established a co-ordinate tax system with separate sources of revenue, theoretically and constitutionally at least, each supplementing the other without overlapping—a federal system which lent itself without friction to uniform application. It also was held that such a system was in the interest of equality and equity as between the states and the federal government and on the part of those who bore the burden of the tax.

Accordingly, by the provisions of the Revenue Act of September 8, 1916 (39 U. S. Stat. 777 *et seq.*; 6 U. S. Compiled Stat. 1916, ch. 10A, p. 7364, § 6336½a *et seq.*) the Congress imposed an "estate tax" as distinguished from an "inheritance tax" on estates of deceased persons and placed the burden of the tax upon the residuary estate rather than upon legacies (*Matter of Hamlin*, 226 N. Y. 407). In that act and in subsequent similarly worded acts including the act in effect at the death of Mrs. del Drago, it was provided that the tax should be upon the net estate as found according to the provisions of the act, chargeable to and payable by the executor before distribution *without recourse to the beneficiaries*, that it was not a tax upon the shares which the legatees should take or upon the persons taking those shares and that it was a tax upon the transfer of the estate as a whole at the time of death and not a tax on the person's privilege of receiving property under the will. Leaving no doubt that it was the purpose and intent of Congress to [fol. 95] exclude specific legatees, as such, from bearing any of the burden of the tax, the Revenue Act of 1916

(§ 208; 39 U. S. Stat. p. 779) contained a provision which has been carried forward by Congress in subsequent estate tax acts (*e. g.*, U. S. Code, tit. 26, § 826, par. [b]; 44 U. S. Stat. 79) that "if the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of; any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." The courts have uniformly refused to order proration or apportionment among legatees of the amount of the tax (*Matter of Hamlin, supra; Farmers Loan & Trust Co.* v. *Winthrop, supra; Matter of Oakes*, 248 N. Y. 280; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471; *Knowlton* v. *Moore, supra; Coolidge* v. *Long*, 282 U. S. 582; *Y. M. C. A.* v. *Davis, supra*).

Under articles 10 (L. 1909, ch. 62, as amd.), and 10-A (L. 1925, ch. 143, as amd.) the New York Legislature imposed inheritance taxes upon individual legacies. Under article 10-B (L. 1925, ch. 320) it was provided that the state death tax was "imposed upon the transfer of the net estate" (§ 249-a). The executor of every estate was made personally liable for the tax (§ 249-g). The executor was required to make a return within two months after the decedent's death or within a like period after qualifying as executor (§ 249-d), was forbidden finally to account unless he should have produced a final receipt or a certified copy thereof showing the payment of any taxes due (§ 249-c), was authorized to sell so much of the property of the estate as would enable him to pay the tax in the same manner provided by law for payment of a decedent's debt, and the State Tax Commissioner was authorized to maintain an action against the executor personally to recover the tax (§ 249-g). If any part of the tax was paid out of a distributive share, the person entitled to that share was entitled to reimbursement and tax upon the legacies, as such, was

effectively barred (§ 249-g). It was stated to be "the purpose and intent of this article that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." (§ 249-g.) Thus state death duties for purposes of [fol. 96] state revenue were assessable and collectible and the burden imposed in the same manner as the federal estate tax. In each sovereignty, the applicable statutes required the tax to be deducted and paid from the net estate before determination and computation of the shares payable to individual legatees.

After much agitation and effort in and out of the Legislature, a new state tax law applicable to estates of persons dying after September 1, 1930, was passed by the Legislature and became effective on that date (L. 1930, ch. 710, amdg. L. 1909, ch. 62, by adding a new article to be known as 10-C). By the provisions of the act itself, history of inheritance tax legislation of the state and proceedings antecedent to its passage, it was clearly shown that the act was passed for the purpose (1) of imposing death duties upon those who received the benefit and not upon the estate of the deceased and (2) to compel similar distribution of the federal estate tax notwithstanding and in the face of the federal law to the contrary (McKinney's historical note, vol. 13, p. 420). The act required that the tax be apportioned among the beneficiaries and the order of reimbursement of the previous act was reversed. It was provided that the executor should pay the tax out of the net estate, should not make reimbursement to legatees but that he was entitled to contribution from them. It was provided that in respect to persons dying after September 1, 1930, that article should supersede any article of the Tax Law "which imposes a transfer, inheritance or estate tax" (§ 249-mm) and that no exemption provided for in any other article of the Tax Law or of any other law of the state should be construed as being applicable under the new article. The act contains in itself no provision for apportionment and distribution of the tax among the legatees or distributees. In the face of probable necessary construction and possible unconstitutionality (*Knowlton* v. *Moore, supra*), other provisions were added (§ 249-t) and the Decedent Estate Law was amended (§ 124; L. 1930, ch. 709, effective September 1, 1930), whereby the rate of

the tax is fixed by the amount of the estate and the tax found due is apportioned among the various legatees according to that rate. Section 249-t of the Tax Law provides for exclusive jurisdiction in the Surrogate's Court "to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided." (§ 249-kk.) Section 124 of the Decedent Estate [fol. 97] Law provides that the death tax imposed shall "so far as is practicable and unless otherwise directed by the will of the decedent * * * be paid by the executor as such out of the estate before its distribution," and the executor shall not be required to distribute under the will any property with respect to which federal or state estate tax is imposed unless the amount thereof is apportioned to the distributees and such taxes are paid. Subdivision 1 of the section provides a scheme for apportionment and distribution and leaves it in the hands of the Surrogate equitably to carry that scheme into effect as far as the state tax is concerned. But it does not stop there. It further provides that the estate tax paid by an executor "under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, [with an exception (L. 1940, ch. 829, § 13)] shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues," and makes it mandatory on the executor, as to any property that does not come into his hands, "to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor."

[fol. 98] The Federal Revenue Act of 1918, in essential respects similar to the act of 1916 so far as the point at issue is concerned, was held in *Y. M. C. A.* v. *Davis* (*supra*, p. 50) to be "an excise upon the transfer of an estate upon death of the owner" and "not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death." So far as material, identical provisions are contained in the Federal Estate Tax Law applicable to the estate under consideration. Similar provisions to those contained in the 1916 act were construed as above in *Matter of Oakes* (248 N. Y. 280) and the act was held constitutional in *New York Trust Co.* v. *Eisner* (*supra*) on the basis of such a construction since the federal tax was an excise upon the right of transmission of the whole estate applicable from its beginning to final distribution of the estate. The federal policy to control the incidence of the estate tax is clearly established and declared not only in the law itself but by our own decisions (*Hamlin, Oakes* and *Winthrop* cases) and by necessary implication (*Matter of Neagle*, 39 Fed. Rep. 833). It was definitely established for uniform application in 1916 long prior to the policy-fixing tax statutes of the State of New York in 1930.

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances" (*DeVaughn* v. *Hutchinson*, 165 U. S. 566, 570). Nevertheless, every sovereignty, whether state or federal, possesses the power of regulating the manner and terms upon which property, both real and personal, within its dominion may be transmitted by will and of prescribing who shall and who shall not be capable of taking it (11 Am. Juris., Conflict of Laws, § 169; *Mager* v. *Grima*, 8 How. [U. S.] 490; *United States* v. *Perkins*, 163 U. S. 625; *Blythe* v. *Hinckley*, 180 U. S. 333; *Nielsen* v. *Johnson*, 279 U. S. 47; *Snyder* v. *Bettman*, 190 U. S. 249, 252; *Santovincenzo* v. *Egan*, 284 U. S. 30, 40; *Knowlton* v. *Moore*, *supra*; *Johnson* v. *Olson*, 92 Kan. 819; L. R. A. 1915E, 327 and note; *Rixner's Succession*, 48 La. Ann. 552; 33 L. R. A. 177; *Easton* v. *Huott*, 95 Iowa, 473; 31 L. R. A. 177). Under all sorts

of conditions, control over the right to hold and over the use, devolution and transmission of real and personal property of citizens within the United States has been exercised by Congress under the Constitution. It is a subject so broad that time and space and lack of importance to the present decision forbid extensive and detailed refer- [fol. 99] ences. The right to impose an estate tax and to regulate and control its incidence or to determine the right to take by will is not exclusive to the state (See cases *supra; Murdock* v. *Ward*, 178 U. S. 139; *Knowlton* v. *Moore, supra; Snyder* v. *Bettman, supra; New York Trust Co.* v. *Eisner, supra; Burnet* v. *Brooks*, 288 U. S. 378; *Matter of Hamlin, supra*) and that conclusion is not in any manner affected by the dicta in *Edwards* v. *Slocum* (287 Fed. Rep. 651) or by the misconstruction and misapplication of the reference to the lack of concern of the United States in the incidence of the federal estate tax in the *Eisner* case or in other state cases of similar import. The state has not, as it has been loosely said, exclusive power, as against the federal government, to say who and in what proportions recipients of a testator's bounty or distributees of an intestate's estate shall take of either the gross or net estate. *Knowlton* v. *Moore* (*supra*) the theory that the state may impose regulations as to the incidence of the federal estate tax to the exclusion of the right of Congress finally to fix the incidence of that tax because the state has the right to regulate successions was exploded.

The state's right to taxation is subordinate to that of the federal government and when the latter has acted in a particular field, the full import and all the implications of that act must control. The Congress has not only acted in the field of decedents' estate taxation to levy and collect duties but has expressly directed the manner of payment of such duties and excluded specific legatees from bearing the burden of any such levy. Such exclusion was final and conclusive and beyond the power of the state to vary or change. But if it be urged that failure of Congress to be more specific as to its purpose to exercise complete control of the incidence of the estate tax to the exclusion of state interference indicates an intent that the state might legislate on the subject, the answer is that silence does not give consent but implies only that there shall be no interference with the federal scheme (*Prigg* v. *Pennsylvania*, 16 Pet. [U. S.] 539; *United States* v. *Snyder*,

149 U. S. 210; *W. U. Tel. Co.* v. *Boegli*, 251 U. S. 315; *Hines* v. *Lowrey*, 305 U. S. 85, 91; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Erickson* v. *Macy*, 231 N. Y. 86, 91). In *Prigg* v. *Pennsylvania* it was urged that Congress had the exclusive power of legislation upon the subject-matter under consideration under the provisions of the Constitution of the United States, that if that power was not exclusive in Congress, still the concurrent power of the State [fol. 100] Legislature was suspended by the actual exercise of the power of Congress and that if not suspended still the statute of Pennsylvania in all its provisions applicable to that case was in direct collision with the act of Congress and, therefore, unconstitutional and void. It appeared in that case that Congress had legislated upon the subject-matter in controversy. Thereupon the court said: "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this court, in the case of *Houston* v. *Moore*, 5 Wheat. 1, 21, 22; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed" (p. 617). In *United States* v. *Snyder* the court had under consideration the question of the right of the states under reserve power to interfere with the collection of a tax imposed by Congress. The court said: "The 8th section of the 1st article declares that 'the Congress shall have power to lay and collect taxes, duties, imposts and excises, • • • but all duties, imposts and excises shall be uniform throughout the United States.' The power to impose and collect the public burthens is here given in terms as absolute as the

language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can, by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected" (p. 214).

Since Congress had the power to lay and collect taxes on decedents' estates and determine where the burden should rest (*New York Trust Co.* v. *Eisner, supra*), those acts are the supreme law of the land and the state legislative acts in question, if in conflict with the federal law, are a nullity though enacted in the exercise of concurrent and not controverted powers (*Gibbons* v. *Ogden*, 9 Wheat. 1, 24, [fol. 101] 211; *Florida* v. *Mellon*, 273 U. S. 12, 17). That the federal and state statutes are in conflict on the question of where the burden of the federal tax shall fall is beyond doubt. The federal acts place the incidence of the tax upon the net residuary estate payable by the executor before distribution *without recourse to the individual legatees;* the state acts, though requiring the executor to pay, impose the burden of the federal estate tax upon the specific legatees and require the executor to deduct the *pro rata* burden from each legacy or collect such share or the part thereof he has paid from such legacy. So far as federal excises are concerned, the burden may not be regulated, distributed or apportioned by the state. Distribution must be accomplished under the federal law within the field within which Congress purports to act and has acted consistently and continually since long prior to 1930 when the state acts under attack went into effect. Repugnancy of the state acts to the federal acts render the former inoperative in so far as they purport to regulate the incidence of the federal estate tax and authorize and direct its distribution and apportionment. It is quite clear also that there can be no uniform operation of the federal estate act if each state is to determine for itself how distribution and apportionment of the tax shall be made.

In neither of the cases relied upon, in part at least, by the learned Surrogate (*Matter of Scott*, 274 N. Y. 538; certiorari denied, 302 U. S. 721; *Edwards* v. *Slocum*, 287 Fed. Rep. 651; affd., 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, 264 U. S. 47) was the question here presented raised or

decided or a determination thereof necessary for the decision. The only satisfaction that respondents may derive from those cases is eked out of isolated sentences from the opinions which are pure dicta. In the *Scott* case the deceased left various life insurance policies with benefits payable periodically to beneficiaries named in the policies and the questions propounded and decided were whether (1) the benefits were included in the gross estate of deceased and fell within the intendment of section 124 of the Decedent Estate Law and (2) whether, if applicable, the section was repugnant to due process and involved unconstitutional impairment of the obligation of contracts. The only questions involved in the *Edwards* case were the power of the federal government to impose an estate tax upon the gross net estate of a deceased where a part passed to charity and the scope of the Federal Estate Tax Law as to the imposition of such a tax. In the *Davis* case (p. 48), arising in Ohio, the question was what effect payment by an executor of the federal estate tax should "have in the distribution of the estate among the legatees and beneficiaries under the will" under the provisions, properly construed, of the applicable Federal Estate Tax Law.

[fol. 102] The question of the justice or equity of placing the burden upon the residuary estate is entirely irrelevant to the question under consideration. Whether it is just and equitable in all cases to impose the tax upon the estate as a whole and not upon the specific legatees on the benefits they derive from the estate is a matter admitting of wide diversity of opinion. It is not the province of the courts to resolve that conflict. "The Congress has spoken and it is our function to interpret, not to legislate" (*Matter of Hamlin*, 226 N. Y. 407, 420; certiorari denied, 250 U. S. 672; *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 496, 497; certiorari denied, 266 U. S. 633; *Matter of Vanderbilt*, 231 N. Y. 297; affd., 309 U. S. 530). Deceased knew the law when she made her will, and then knew that in the absence of directions to the contrary in the will all federal estate taxes would be payable out of her residuary estate and that her net estate, after deduction of the federal tax, would alone be available for distribution to legatees and she thereby took into account any alleged inequities that might result in its application (*New York Trust Co.* v. *Eisner, supra; Matter of Vanderbilt, supra*). In making her will she had a right to rely upon the federal law as the only law fixing

the burden of the federal estate taxes. It is not our province to remake the will and to have it provide as her wish and intent that such taxes should be apportioned and prorated among the various specific legatees.

It follows that in so far as section 124 of the Decedent Estate Law or section 249-t of article 10-C of the State Tax Law authorize, require or direct distribution and apportionment of the federal estate taxes levied and to be levied upon the estate of the deceased among the legatees, they are repugnant to the provisions of the Federal Estate Tax Act of 1926 and amendments thereto, the Congress being competent to legislate on the subject of estate excises, and to the uniformity and supremacy clauses of the Federal Constitution and are, therefore, unconstitutional. Since what we have said above is decisive of the issue here involved, it is unnecessary to consider other grounds of unconstitutionality which appellants urge. The question of the repugnancy of the legislative acts to the New York State Constitution is not before us on this record and nothing said above is to be considered an expression of opinion on that subject.

The order of the Surrogate's Court should be reversed, with costs in this court and in the Surrogate's Court to each party appearing and filing a separate brief payable out of the estate and the matter remitted to the Surrogate's Court to proceed in accordance with this opinion.

[fol. 103] DESMOND, J. (dissenting):

The appellants are general legatees under the will of Josephine del Drago. Over their objection the Surrogate, in this accounting proceeding, prorated the federal estate tax equitably "among the persons interested in the estate" and ordered the executor to charge the prorated amounts against the persons so interested, including appellants. All this was in obedience to the command of section 124 of the Decedent Estate Law, applicable to this estate, since testatrix did not direct otherwise in her will. In this court there is raised by appellants only one objection to this prorating and apportionment, namely, that section 124, in so far as it directs such prorating and apportionment, is invalid as being in conflict with the "Supremacy Clause" of the Federal Constitution (Art. VI, cl. 2).

The estate of Josephine del Drago became subject at her death to a tax imposed by the United States on the

estates of decedents. No one questions that the tax so imposed is a true estate tax, falling on the estate itself and payable from the estate, and is not an inheritance tax which falls on the separate shares of the estate which go to the several beneficiaries. It is an excise tax laid upon the privilege of transmitting property rights at death. (*Matter of Vanderbilt*, 281 N. Y. 297, 311, 315.) To make this entirely clear, Congress provided (U. S. Code, tit. 26, § 826, par. [b]) that "so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Congress never directed that the tax was to be paid out of the residuary estate and it "is not a tax upon a residue." (*Edwards* v. *Slocum*, 264 U. S. 61, 62.) Nor did Congress ever attempt to forbid the local probate courts to fix the final incidence of the tax by apportioning its burden among the several beneficiaries, after the executor has paid it. Indeed, there is much evidence from various sources that Congress was not at all concerned about this matter of final incidence and that its only intent was to set up a simple system whereby there should be taken out of sizable estates, before any distribution was had in those estates, a sum fixed by the federal statute. Congressman Kitchin, Chairman of the House Ways and Means Committee, said on the floor of the House in answer to a question: "We levy the tax on the transfer of the flat or whole net estate. We do not fol- [fol. 104] low the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution." (Congressional Record, 64th Congress [1916], pt. 15, p. 1942). The Senate Committee on Finance adopted this language in its own report on the bill (quoted in *Matter of Hamlin*, 226 N. Y. 407, at pp. 415, 416). The federal statute was, therefore, so drawn as not to control or determine the final incidence of the tax. As Circuit Judge Hough said in *Edwards* v. *Slocum* (287 Fed. Rep. 651, 653): "So far as the words of the statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees

cannot agree as to the burden bearing, the state courts can settle the matter."

In affirming the decision of the Circuit Court of Appeals in *Edwards* v. *Slocum*, the Supreme Court (264 U. S. 61, 63) gave at least seeming approval to the position taken by the Attorney-General that "the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation." On the same day, February 18, 1924, the Supreme Court announced its decision in *Y. M. C. A.* v. *Davis* (264 U. S. 47). There, in discussing the effect on charities, ordinarily exempt from federal taxation of the deduction of this federal estate tax from the residue in which the charities took a share, the Supreme Court held that the charities were not exempted from the final burden of the tax despite the fact that the statute in computing the net estate, deducted amounts bequeathed to charities. Comparing the situation of the charities with that of a beneficiary who might take under a will the first $50,000 of an estate (this first $50,000 being at that time similarly exempted in computing the net estate) the Supreme Court remarked that the legatee who took that $50,000 might ultimately have to stand his share of the Federal estate tax, "if by the law of the state, such should be its incidence" (p. 51).

We need not take time for a careful inquiry as to whether or not these expressions in the federal decisions are dicta. Dicta or not, binding on us or not, they cannot be ignored, particularly when they have been so long regarded as stating the law, and when they agree with the expressed views of the members of Congress and with the logic of the situation. Why should Congress concern itself as to the ultimate resting place of this tax? Having seen to it that the federal government's toll shall always be taken before the beneficiaries divided up the estate, having commanded the executor to pay the tax before the distribution begins, and hav- [fol. 105] ing provided adequate penalties for his failure so to do, what matters it to Congress how local law afterwards apportions the tax among the legatees or devisees? Long before the turn of the legatees and devisees comes, the United States Collector of Internal Revenue has gotten the government's tax money and closed the books on the estate. Thus in no real or reasonable sense can it be said that a later apportionment interferes with the enforcement of the Federal Tax Law, or modifies or changes that tax.

Early in the history of the federal statute, and before New York State had an apportionment statute, this court held that the executor was bound to charge the whole federal tax to the residue, as the state law then stood. (*Matter of Hamlin*, 226 N. Y. 407; certiorari denied, 250 U. S. 672.) This decision does not rest on any federal statute directing that the tax be charged finally, or in the first instance, upon the residue, for there is no such statute. The federal statute says only that the tax "shall be imposed upon the transfer of the net estate" (U. S. Code, tit. 26, § 810) and that "so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution" (U. S. Code, tit. 26, § 826). From these statutory provisions directing the executor to pay the tax to the Collector out of the net estate before distributing it, it follows mathematically, in most estates, that the original source of payment is the residue of the estate. It is quite a long jump from that interpretation of the "net estate" provision in the federal statute, to the position, here taken by appellants, that the statute somehow amounts to a prohibition against any prorating of the tax by a state among beneficiaries after it has been paid to the United States out of the residue.

Even without a state prorating statute, there are cases where, mathematically, the tax cannot be paid out of the residue, but must be charged immediately on the several bequests or devises. Suppose a case where there is no residue, as where the general legacies equal or exceed the actual net estate. In such a case the executor, paying the federal tax from the "net estate," is in fact deducting it from the amount available for the general legacies. Would he then not have to prorate it against those legacies, whether or not any statute so directed?

The *Hamlin* case (*supra*) and the later cases of *Farmers' Loan & Trust Co.* v. *Winthrop* (238 N. Y. 488) and *Matter of Oakes* (248 N. Y. 280) held, we have seen, that under the statutes as they then stood the tax was ordinarily a charge upon the residue, "primarily at least" (*Oakes* opinion at p. 282). The resulting situation had its difficulties. The New York State Commission to Report Defects in the Law of Estates, which included among its members some of the [fol. 106] recognized experts in the field, reported as follows in 1930: "Experience has demonstrated that in most estates the residuary legatees are the widow, children, or

nearer and more dependent relatives. This has been one of the objections to the Federal Estate Tax Law in New York. The burden of the tax has been imposed upon the residuary legatees not only as to the property passing under the will, but also upon transfers whether by gift or *inter vivos* trust, or other form of transfer taking effect at death. These transfers are included in both the Federal Estate Tax Law and under the proposed New York State Estate Tax Law as subject to taxation. Thus the residuary legatees have been compelled to pay the entire estate tax, including the tax assessed on testamentary transfers and those taking effect at death." (Combined Reports of Commission to Investigate Defects in Laws of Estates [1928-1933]. Reprint ed., p. 338.) The Commission then proposed what is now section 124 of the Decedent Estate Law, to provide statutory authority for the equitable apportionment of the estate taxes, both federal and state, citing as authority for the legality of such an apportionment statute, *Edwards* v. *Slocum* (*supra*).

Section 124, so proposed, was enacted by the Legislature and became effective in 1930. At least one other state, Pennsylvania, has a similar prorating statute (Pennsylvania Stat. Annotated [Purdon] tit. 20, § 844), passed in 1937. So far as appears, no court, state or federal, has ever held that a state is without power to pass such an act. The constitutionality of section 124 as against other claims of invalidity was upheld by this court in *Matter of Scott* (274 N. Y. 538; certiorari denied, 302 U. S. 721). In that case there was not advanced at all the theory of unconstitutionality for which appellants here contend, *i. e.*, that section 124 is in conflict with the so-called Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

We do not find here any such interference by the state with the federal taxing power, or any attempt by the state statute to assert supremacy. We see no possible conflict between the command of the federal estate tax statute that, unless otherwise directed by the will, the tax be paid out of the net estate and the provision of section 124 that, unless otherwise directed by the will, the tax be apportioned. We have shown, above, that the interest and activity of the United States ceases when the executor has paid the tax, that the federal statute not only does not make the tax a non-transferable charge on the residue, but does not command payment from the residue at all. How then can there

be any conflict? Surely appellants are not claiming that the field of estate taxation is one altogether sacred to the federal power, or that it is one of those fields from which the states are excluded, once Congress has entered in. Both [fol. 107] the national and the state governments have power to impose such taxes (*Snyder* v. *Bettman*, 190 U. S. 249). The power of Congress so to legislate is not superior to that of the State Legislatures: "* * * in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States, and not in Congress" (*Knowlton* v. *Moore*, 178 U. S. 41, 58). Having in fullest measure the power of "regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance" (*Mager* v. *Grima*, 8 How. [U. S.] 490, 493), a state, it would seem, may enact any reasonable measure to control such transmittal at death, by the levying or apportionment of taxes. So complete is the state's power in this respect that it may impose such a tax on the United States of America itself, when the United States is a legatee (*United States* v. *Perkins*, 163 U. S. 625, 627) and may tax an estate or a legacy consisting entirely of United States bonds, although the bonds were issued under a federal statute declaring them to be exempt from state taxation in any form (*Plummer* v. *Coler*, 178 U. S. 115). Our conclusion that the Congress has not attempted to restrain the states from fixing the final incidence of this federal estate tax, is strengthened by the authorities just cited which go far toward holding that such an attempted restraint by the Congress on the states would be an invasion of the state's power to regulate the manner and term of transmitting property by will or inheritance.

Finally, there is a strong presumption in favor of a state statute, that it conforms to, and does not conflict with, the Federal Constitution. "Doubts on this point are to be resolved in favor of, and not against, the State" (*Corporation Commission* v. *Lowe*, 281 U. S. 431, 438). Practical considerations impel us to the same result. Why should we strain to hold this statute unconstitutional, when in so holding, we produce a result which the testatrix plainly did not intend? The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section

124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could, by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. We should not do it for her.

The order of the Surrogate should be affirmed, with costs against appellants.

Finch, Lewis and Conway, JJ., concur with Rippey, J.; Desmond, J., dissents in opinion in which Lehman, Ch. J., and Loughran, J., concur.

Order reversed, etc.

[fol. 108] COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of November in the year of our Lord one thousand nine hundred and forty-one, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur November 28, 1941.

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs., &c., of Josephine del Drago, dec'd., &c.

Be It Remembered, That on the 20th day of March in the year of our Lord one thousand nine hundred and forty-one, Giovanni del Drago, individually, &c., and another, the appellants in this cause, came here unto the Court of Appeals, by Ludwig M. Wilson and another, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Surrogates' Court, New York County. And Byron Clark, Jr., as executor, &c., and others, &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Grant, Clark & Fox and others, their attorneys.

[fol. 109] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Henry Cohen, of counsel for the ap-

pellants; and by Mr. Lawrason Riggs, Jr., of counsel for the respondent—special guardian, &c.; submitted by other respondents; and after dued eliberation had thereon, did order and adjudge that the order of the Surrogates' Court appealed from herein be and the same hereby is reversed with costs in this court and in the Surrogates' Court to each party appearing and filing separate brief payable out of the estate, and the matter remitted to the Surrogates' Court to proceed in accordance with the opinion of Rippey, J. herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law. Therefore, it is considered that the said order of the Surrogates' Court be reversed with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates [fol. 110] thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 28, 1941:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 111] State of New York,
In Court of Appeals:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-second day of January A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

In the Matter of the Petition for the judicial settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs. &c., of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

GIOVANNI DEL DRAGO, ind., & ANO., Appellants,

BYRON CLARK, JR., as Exr., LAWRASON RIGGS, JR., & ORS., &c., Respondents

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the respondent, Lawrason Riggs, Jr., as Special Guardian &c., herein, and papers having been duly submitted thereon, and due deliberation thereupon had;

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A Copy.

Stewart G. Cook, Deputy Clerk. (Seal, State of New York, Court of Appeals.)

[fol. 112] STATE OF NEW YORK,
In Court of Appeals:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-second day of January A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding.

In the Matter of the Petition for the judicial settlement of the Account of Proceedings of GIOVANNI DEL DRAGO & ANO., as Exrs. &c., of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

GIOVANNI DEL DRAGO, ind., & ANO., Appellants,

BYRON CLARK, JR., as Exr., LAWRASON RIGGS, JR., & ORS., &c., Respondents

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the respondent, Lawrason Riggs, Jr., Special Guardian &c.,

papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is denied upon the ground that the opinions in this Court show that upon the appeal a Federal question was presented and necessarily passed upon.

A copy.

Stewart G. Cook, Deputy Clerk. (Seal, State of New York, Court of Appeals.)

[fol. 113] At the Surrogate's Court of the County of New York, at the Hall of Records, on the 16th day of February, in the year One Thousand, Nine Hundred and forty-two.

Present: Hon. James A. Foley, Surrogate.

In the Matter of the Petition for the Judicial Settlement of the Account of Proceedings of Giovanni del Drago and Byron Clark, Jr., as Executors of the Last Will and Testament of Josephine del Drago, Deceased, and for a construction of said Will and for instructions

Order on Remittitur

An appeal having been taken to the Court of Appeals from those parts of the decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the Will, be, and the same hereby are overruled, and that no ground of unconstitutionality, attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

* * * * * * *

Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned

pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

[fol. 114] and from so much of the supplemental decree entered in the office of the Clerk of the Surrogate's Court, New York County, on the 24th day of December, 1940, as reads as follows:

"It is Ordered, Adjudged and Decreed that the decree heretofore entered herein on November 19, 1940, be and the same hereby is in all respects confirmed; and it is further Ordered, Adjudged and Decreed that all of the terms and provisions of said decree shall be binding upon Clemente Francesco del Drago, an infant under the age of fourteen years with the same force and effect as if said infant had been a party to this proceeding at the date of the entry of said decree";

And after due deliberation the Court of Appeals having ordered and adjudged that the orders so appealed from, be reversed with costs in that Court and in the Surrogate's Court, to each party appearing and filing a separate brief, payable out of the estate, and that the matter be remitted to the Surrogate's Court to proceed in accordance with the opinion of the Court of Appeals, and the remittitur of the Court of Appeals, together with a certified copy of the order of that Court having been duly filed in the office of the Clerk of the Surrogate's Court of New York County on the 5th day of December, 1941;

And a motion for reargument having been made upon the part of Lawrason Riggs, Jr., as Special Guardian, etc., on which the Court of Appeals made its order dated the 22nd day of January, 1942, denying said motion with $10.00 costs and necessary printing disbursements, and a motion to amend the remittitur having been made upon the part of [fol. 115] said Special Guardian, which the Court of Appeals denied by its order dated the 22nd day of January, 1942, upon the ground that the opinions in said Court show that upon said appeal a Federal question was presented and necessarily passed upon, and certified copies of said orders denying said respective motions having been duly filed in the office of the Clerk on the 3rd day of February, 1942,

Now, upon reading the remittitur of the Court of Appeals dated November 28, 1941, and certified copies of the orders of said Court dated January 22, 1942, hereinbefore described, and upon reading and filing the application for an allowance of counsel fees to Henry Cohen and Ludwig M. Wilson and the affidavits of said Henry Cohen and Ludwig M. Wilson, both verified December 31, 1941, and the reply affidavit of Ludwig M. Wilson, verified January 9, 1942, in support of the said application, and on reading and filing the affidavit of Frank C. Laughlin, verified January 7, 1942, in opposition, and on filing the written decision of the Surrogate, it is

Ordered, Adjudged and Decreed that the order of the Court of Appeals dated the 27th day of November, 1941, be and the same hereby is, and its said respective orders, dated the 22nd day of January, 1942, be and the same hereby are, made the orders of this Court; and it is further

Ordered, Adjudged and Decreed, that the said application for allowance and counsel fees payable out of the estate to Henry Cohen and Ludwig M. Wilson be and the same hereby is denied upon the law; and it is further

Ordered, Adjudged and Decreed, that the fixation of the allowances to the Special Guardians be held in abeyance [fol. 116] until after the decision of the United States Supreme Court on the question of the constitutionality of Section 124 of the Decedent Estate Law; and it is further

Ordered, Adjudged and Decreed, that upon the entry of this order and decree, the Executors shall pay the costs and disbursements taxed pursuant thereto, out of the estate of said decedent, as follows:

To Ludwig M. Wilson and Robert W. Maloney, as attorneys for Marcel del Drago and Giovanni del Drago, individually, the sum of $656.42, and the further sum of $30.00.

To Lawrason Riggs, Jr., Special Guardian, the sum of $112.15,

and it is further

Ordered, Adjudged and Decreed, that both the order of this Court entered in the office of the Clerk of the Surrogate's Court, New York County, on the 19th day of November, 1940, and the supplementary order of this Court entered in the office of its clerk on the 24th day of Decem-

ber, 1940, be and the same hereby are amended by eliminating from the order dated the 19th day of November, 1940, those portions thereof which are as follows:

"Ordered, Adjudged and Decreed, that all of the objections of said Marcel del Drago and Giovanni del Drago, individually, to the constitutionality of Section 124 of the Decedent Estate Law and to the equitable proration of the Federal Estate Tax on the estate of said decedent against the respective interests of all the beneficiaries named in the will, be, and the same hereby are, overruled, and that no ground of unconstitutionality attaches to the provisions of Section 124 of the Decedent Estate Law nor to the method of the equitable apportionment of the Federal Estate Tax and New York Estate Tax pursuant to its terms;

. . . . . .

[fol. 117] Ordered, Adjudged and Decreed, that the amount of the Federal and New York State estate taxes which may be paid by the executors be equitably prorated and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law, and that such proration be included in the decree to be entered on a subsequent accounting after such taxes have been fixed and paid;"

and by substituting in place of such eliminated parts of the aforesaid order the following:

"Ordered, Adjudged and Decreed, that the objections of said Marcel del Drago and Giovanni del Drago, individually, be and the same hereby are sustained insofar as they demand that the executors refrain from apportionment of the Federal Estate taxes levied and to be levied upon the estate of the deceased among the persons beneficially interested in the estate;

. . . . . .

Ordered, Adjudged and Decreed, that the payment of the said Federal Estate tax by the Executors out of the general estate of the decedent without proration against the respective interests of the several beneficiaries named in the Will, be and the same hereby is directed and approved; and it is further

Ordered, Adjudged and Decreed that the amount of the New York State Estate taxes which have heretofore been or may hereafter be paid by the Executors, be prorated

and apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law and that such proration be included in the decree to be entered on a subsequent accounting after such New York State Estate taxes have been fixed and paid."

James A. Foley, Surrogate.

Filed, Feb. 18, 1942.

[fol. 118] State of New York,
County of New York, ss:

I, George Loesch, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the foregoing copy of the remittitur of the Court of Appeals filed December 5, 1941; two copies of orders of the Court of Appeals filed February 3, 1942, denying motions for reargument and for amendment of aforesaid remittitur; and the order of the Surrogate on the aforesaid remittitur filed February 18, 1942, in the voluntary accounting proceeding in the estate of Josephine del Drago, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York this 18th day of February in the year of our Lord one thousand nine hundred and forty-two.

George Loesch, Clerk of the Surrogate's Court.
(Seal.)

P-2549-1937
M

[fol. 119] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 30, 1942

The petition herein for a writ of certiorari to the Surrogate's Court, New York County, State of New York, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,308. New York, Surrogate's Court, New York County. Term No. 980. Lawrason Riggs, Jr., Special Guardian, Petitioner, vs. Giovanni Del Drago, Marcel Del Drago, Byron Clark, Jr., as Executor, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 26, 1942. Term No. 980, O. T. 1941.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 26 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~980~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN. EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

JOHN W. DAVIS,
OTIS T. BRADLEY,
ANDREW Y. ROGERS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

—against—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LAWRASON RIGGS, JR. as Special Guardian petitions for a writ of certiorari to review a decision of the Court of Appeals of the State of New York which determined Section 124 of the New York Decedent Estate Law to be invalid upon the ground of repugnancy to the Federal Estate Tax Law and to the supremacy and uniformity clauses of the Constitution of the United States.

Section 124 of the New York Decedent Estate Law (Chapter 710 of the Laws of 1930 set forth in the appendix) provides in substance that whenever it appears upon an executor's or other fiduciary's accounting that such executor or other fiduciary has paid a federal estate tax upon or with respect to any property required to be included

in the gross estate of the decedent under the Federal Estate Tax Law, the amount of the tax so paid, except where a testator otherwise directs in his will, shall be equitably prorated among all the persons sharing in such taxable estate.

SUMMARY STATEMENT OF MATTER INVOLVED.

Josephine del Drago died October 8, 1937, a resident of the County and State of New York, leaving a will dated March 27, 1934, which was admitted to probate by the Surrogate's Court of New York County on April 6, 1938, and letters testamentary were duly issued by that court (R. 25).

At her death Josephine del Drago was possessed of an estate of upwards of $1,000,000. By her will she provided general legacies both outright and in trust and created a residuary trust of the balance. Her will contained no direction with respect to estate taxes or their payment (R. 29, 75).

Proceedings in the Surrogate's Court of New York County.

On January 31, 1940, the executors commenced a proceeding in the Surrogate's Court of New York County for a judicial settlement of their account (R. 1).

All persons interested in the estate were duly made parties to the proceeding and the petitioner here, Lawrason Riggs, Jr. was appointed special guardian to represent the interests of the infant remaindermen of the residuary trust (R. 1, 2).

The executors' account showed that the executors had paid $230,000 to the Collector of Internal Revenue on account of the federal estate tax assessed against the estate (R. 37). By their petition and account the executors asked the Surrogate to determine whether the amount of the federal estate tax paid should be equitably apportioned among all

persons beneficially interested in the estate pursuant to Section 124 of the New York Decedent Estate Law (R. 28, 36, 37).

Certain of the respondents here, Giovanni del Drago and Marcel del Drago, beneficiaries of an outright general legacy and a general legacy in trust respectively, answered the petition setting forth specific objections to the constitutionality of Section 124 of the Decedent Estate Law and claiming that for this reason no part of the amount of the tax should be apportioned against their general legacies but that the entire amount of the tax should be charged against the residuary trust (R. 38-46).

The petitioner here, Lawrason Riggs, Jr., representing the infant remaindermen of the residuary trust, in his report as special guardian asserted that the amount of the federal tax should be apportioned among all beneficiaries of the estate pursuant to Section 124 and should not be charged entirely against the residuary trust (R. 53).

The chief constitutional ground relied on by the objectants was that Section 124 of the Decedent Estate Law was repugnant to the provisions of the Federal Estate Tax Law* and therefore violated Article VI (the supremacy clause) of the Constitution of the United States. The answers also raised the question of constitutionality under Article I, Section 8 (the uniformity clause) (R. 38-46).**

---

* Title III of the Revenue Act of 1926, as amended and Title II of the Revenue Act of 1932, as amended, under which acts the Federal estate tax on the estate of this decedent was imposed. For convenience, instead of referring to particular sections of the Revenue Act of 1926, as amended, reference will be made to the Internal Revenue Code, the sections of which, relevant to the present controversy, are taken without change from the Revenue Act of 1926, as amended.

** Repugnancy to the Fourteenth Amendment to the Constitution was alleged in the answers but the unconstitutionality of the statute on this ground was not pressed in the Court of Appeals or considered by that court.

The objecting general legatees contended that Congress by enacting an estate tax intended the tax to be borne by the *residuary* estate in every case where the will did not provide to the contrary, that this intention was expressed in Section 826(b) of the Internal Revenue Code (set forth in the appendix) and that the Federal Constitution denied the states power to overrule Congress and shift any part of the tax onto the general legatees.

After a hearing, the constitutional objections of the general legatees to the apportionment of federal taxes were overruled by the Surrogate (*Matter of del Drago*, 175 Misc. 489, 23 N. Y. Supp. (2d) 943) (R. 83-88) and decrees dated November 19, 1940 and December 24, 1940 were duly made and entered accordingly in the Surrogate's Court of New York County (R. 8-24).

Proceedings in the New York Court of Appeals.

From these decrees of the Surrogate's Court of New York County, the general legatees, Giovanni del Drago and Marcel del Drago, as authorized by the New York Constitution and Practice Act, appealed directly to the New York Court of Appeals on the ground that the only question involved on the appeal was the validity of a state statute under the Constitution of the United States (Section 588(3) of the New York Civil Practice Act and Article VI, Section 7(3) of the New York Constitution) (R. 4-7).

The Court of Appeals on November 27, 1941 in a four-to-three decision reversed the determination of the Surrogate on the ground that Section 124 of the Decedent Estate Law was unconstitutional (*Matter of del Drago*, 287 N. Y. 61, 38 N. E. (2d) 131) (R. 91-110).

The Grounds Upon Which the Court of Appeals Determined Section 124 of the New York Decedent Estate Law To Be Unconstitutional.

The majority of the Court of Appeals construed the Federal Estate Tax Law, and Section 826(b) of the Internal

Revenue Code in particular, as placing the ultimate incidence of the tax upon the *net residuary* estate. Having so construed the Federal Estate Tax Law, it determined that the New York statute requiring, in the absence of a provision in the will directing otherwise, proration of the amount of the Federal tax was repugnant to the Federal Estate Tax Law and to so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The majority also held that even though Congress may have failed to fix the incidence of the tax completely, a state may not constitutionally supplement such omissions in the federal act.

Finally the Court determined that there could be no uniform operation of the Federal estate tax if each state determined for itself how the burden of the tax should be borne, and for this reason held Section 124 of the Decedent Estate Law to be repugnant to so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

Proceedings Subsequent to the Determination by the Court of Appeals.

On January 19, 1942 the petitioner here moved for reargument in the Court of Appeals. This motion was denied on January 22, 1942 (R. 111, 112). On the same date this petitioner moved that the order of remittitur of the Court of Appeals be amended to set forth the grounds of the decision. This motion was also denied on January 22, 1942 upon the ground that the Court's opinions showed that upon the appeal a federal question was presented and necessarily passed upon (R. 112, 113).

On February 16, 1942 an order was made by the Surrogate's Court upon the remittitur of the Court of Appeals (R. 113-117).

THE QUESTION PRESENTED.

The question is whether Section 124 of the Decedent Estate Law is repugnant to the Federal Estate Tax Law and violates the supremacy or uniformity clauses of the Federal Constitution.

JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The petition for certiorari is made pursuant to 28 U. S. C. §344(b).

The Court of Appeals, the highest court of the State of New York, has held Section 124 of the New York Decedent Estate Law unconstitutional as repugnant to the Federal Estate Tax Law and to the Constitution of the United States (R. 91-110).

The validity of the state statute was properly drawn in question by answer in the Surrogate's Court of New York County, the court of first instance (R. 38-46), and properly preserved and raised by the taking of a direct appeal and by the notice of appeal to the Court of Appeals (R. 4-6).

The record in this case has been remitted by the Court of Appeals to the Surrogate's Court of New York County.

An order has been entered in the Surrogate's Court of New York County upon the remittitur of the Court of Appeals finally determining the incidence of the Federal estate taxes so far as this estate and the persons interested therein are concerned (R. 113-117).

The petition properly requests that the writ be directed to the Surrogate's Court of New York County. *Graves* v. *Schmidlapp*, cert. granted October 27, 1941, 314 U. S. ——; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Salomon* v. *State Tax Commission*, 278 U. S. 484.

This application is made within the three months allowed by 28 U. S. C. §350, having been made not only within three

months from the date of the order on remittitur made on February 16, 1942 and the denial of the motion for reargument on January 28, 1942, but within three months from the date of the order of the Court of Appeals on November 27, 1941.

THE REASONS FOR THE ALLOWANCE OF THE WRIT.

1. *The Court of Appeals has decided an important question of Federal law which should be finally settled by this Court.*

This Court has never been called on hitherto to determine the constitutionality of a state statute legislating as to the final incidence of the Federal estate tax.

Section 124 providing that except where the will otherwise directs, the amount of the Federal estate tax after it is paid by the executor shall be equitably apportioned among all persons interested in the taxable estate in accordance with their respective benefits, has been a part of the Decedent Estate Law of New York for eleven years. Pursuant thereto the Federal estate tax has been apportioned by New York courts in the judicial settlements of thousands of estates. By the increase in tax rates* and in types and varieties of interests includible in the gross taxable estate, that which was of comparatively lesser moment in estate administration in 1916, and even in 1930, has become a matter of dominant importance in 1942.

---

* For example:

Net Taxable Estate	*Tax Under 1916 Federal Estate Tax Law*	*Tax Under Present Federal Estate Tax Law*
$ 100,000	$ 1,500	$ 20,380*
1,000,000	41,000	290,260*
10,000,000	841,000	5,014,520*

* After maximum credit allowed for state inheritance taxes.

Petitioner believes that it may fairly be said that there are hundreds of instances of estates now in the process of administration in New York State alone which are seriously affected by this decision. The immediate effect of the decision on many such estates in the process of administration is chaotic. Testators, whose wills are now in the process of administration, had sought under the guide set up in Section 124 to secure for the natural objects of their bounty certain portions of whatever property they might have to pass along. In many instances these carefully made plans will be wrecked if the decision stands.

There are many persons now living whose wills have been drawn in the light of Section 124, and who will not or cannot in the natural course of human conduct make the changes rendered necessary by this decision to preserve their actual wishes. Their testamentary schemes are jeopardized or destroyed by the decision.

Pennsylvania has a statute similar to Section 124 of the New York Decedent Estate Law (Purdon's Pa. Stat. Ann. 20 P. S. §844). Petitioner understands that, by reason of the decision of the Court of Appeals, the constitutionality of this statute is now being contested (*Estate of Jennie King Mellon*, Orphan's Court, Allegheny County, Pennsylvania and *Estate of R. Wistar Harvey*, Orphan's Court, Philadelphia County, Pennsylvania).

The result of this determination by the Court of Appeals is not only to render the New York statute invalid. It puts directly in question the power of other state legislatures to deal with the final burden of the Federal tax.

The judiciary of many states also have assumed the right to deal locally with the incidence of the Federal tax. *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786 (and cases therein cited); *Gaede* v. *Carroll*, 114 N. J. Eq. 524, 169 Atl. 172, *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Thompson* v. *Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S. W. 324.

Until a determination of the issue here presented is made by this Court serious doubts will exist as to the power of a state either by its courts or by its legislature to treat the question of the final incidence of the Federal tax after the tax has been paid.

2. ***The Court of Appeals has adopted a construction of the Federal Estate Tax Law contrary to the expressed intention of Congress and contrary to the construction placed upon that law by the Department of Justice, the Treasury Department, the Circuit Court of Appeals for the Second Circuit and this Court.***

In drafting Section 124 of the Decedent Estate Law, the Commission to Investigate Defects in the Laws of Estates (see Combined Reports of Commission, Reprint Edition, p. 338, set forth as an historical note in 13 McKinney's Consolidated Laws of New York, p. 420) specifically relied upon the language of the Circuit Court of Appeals in *Edwards v. Slocum*, 287 Fed. 651 (C. C. A. 2d, Judge Hough writing), aff'd 264 U. S. 61 (involving the method of determining the amount of charitable deductions under the Federal Estate Tax Law) that:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter. * * *"

Eminent counsel for the Department of Justice representing the Treasury Department expressly stated in their brief on appeal to this Court in the *Slocum* case that this proposition of the Circuit Court of Appeals as enunciated by Judge Hough was "fundamental and conceded." This Court

clearly recognized that this was the position taken by the representatives of the Department of Justice and Treasury Department and seemingly expressed its approval of and adopted Judge Hough's proposition in the opinion of Mr. Justice Holmes affirming *Edwards* v. *Slocum* (264 U. S. 61, 63) and in Chief Justice Taft's opinion in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 51, decided on the same date and argued with the *Slocum* case.

This firm position taken by the government was accepted by Congress as representing the correct construction of the Federal Estate Tax Law when, in 1924, as a direct result of the *Slocum* case and shortly after the case was decided, the Federal Estate Tax Law was amended as to the method of computing charitable deductions (Revenue Act of 1924, §303(a)(3)).

This amendment recognized in express terms that the final incidence of this tax or of any estate succession legacy or inheritance taxes might be determined either "by the terms of the will" or "by the law of the jurisdiction under which the estate is administered" or "by the law of the jurisdiction imposing the particular tax".

The phrase "by the law of the jurisdiction under which the estate is administered" is alone decisive of this case.

Conforming with Judge Hough's proposition that the United States was not interested after it had collected its tax, Congress made no attempt here to direct by which one of these methods the final incidence of the Federal estate tax was to determined. U. S. Treasury Regulations 68, Article 44 (1925), interpreting this amendment, read in part:

> " • • • if a residuary estate, or a portion thereof, be bequeathed to charity, *and by the local law* the Federal estate tax is payable out of the residuary estate, the deduction may not exceed that portion of the residuary

estate bequeathed to charity as reduced by the Federal estate tax. * * * " (Italics supplied.)

This portion of the regulation is meaningless unless it is to be read in conformity with the position taken by counsel for the Government and Judge Hough's opinion that the final incidence of the Federal tax is a matter of local law.

The Revenue Act of 1926 did not originally contain this provision of the 1924 Act, but in 1932 it was amended so as to include it (47 Stat. 282). (See H. R. Rep. No. 708, 72d Congress, 1st Sess. (1932) pp. 49-50.) It is now Section 812(d) of the Internal Revenue Code (26 U. S. C. §812(d)) without change (set forth in appendix).

3. ***The Court of Appeals in determining the state statute to be violative of the supremacy and uniformity clauses of the Federal Constitution has determined a Federal question in a way in conflict with applicable decisions of this Court.***

Section 124 of the Decedent Estate Law does not in any way interfere with the power to "lay" or "collect" the Federal Estate Tax (U. S. Constitution, Article I, Section 8, subdivision 1). It expressly refers to a situation where there is a pending accounting and the estate fiduciary "has paid" the tax and is accounting, as fiduciary, to the state courts. It was carefully designed by a commission composed of members of wide experience in these matters so as not to interfere with or to become operative until the tax is collected, the fiduciary has his receipted tax bill and the federal purpose has been fulfilled.

This Court has frequently said that the repugnancy or conflict between the Federal and state acts must be so direct and positive that the two cannot be reconciled or consistently stand together. *Kelly* v. *Washington*, 302 U. S.

1, 10. It has been held by this Court that variations in incidence of Federal taxes by operation of state law do not infringe the constitutional requirement of geographical uniformity. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

4. ***The Court of Appeals in adopting a construction of the Federal statute which leads to absurd, harsh and unnecessary results disregarded this Court's settled principles of statutory construction.***

It is absurd to construe the Federal law as placing the incidence of the tax upon the *residuary* estate when the Federal government can have not the slightest concern as to whether a testator's residuary beneficiaries, as contrasted with his specific pecuniary beneficiaries, shall bear the entire burden of the tax if the will happens to be silent; and when in many instances there will be no residue.

It is a harsh construction because, contrary to the declared policy of the State of New York, it places the final burden entirely upon those whom the State believes the testator, silent on the subject, would naturally intend to be the objects of his bounty.

It is an unnecessary construction because it is in no way relevant to the purpose of the act and does not affect the amount or collection of the Federal tax. By its terms, the apportionment provided by the state law does not become effective until the tax has been paid and the estate has been closed so far as the Federal government is concerned.

This Court has held that a construction leading to such results is to be avoided. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Heydenfeldt* v. *Dancy Gold & Silver Min. Co.*, 93 U. S. 634, 638.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the Surrogate's Court

of New York County, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Court had in this case, to the end that this cause may be reviewed and determined by this Court; that the order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered on the remittitur of the Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

Lawrason Riggs, Jr. as
Special Guardian of the
Children of Mario del Drago

By JOHN W. DAVIS
OTIS T. BRADLEY
ANDREW Y. ROGERS
His Counsel

Dated, New York, N. Y., February 25, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,
—*against*—
GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.
No.

BRIEF IN SUPPORT OF PETITION

Opinions Below.

The opinion of Surrogate Foley is reported in 175 Misc. 489, 23 N. Y. Supp. (2d) 943 and appears at R. 83-87; the opinion of the Court of Appeals and dissent therefrom are reported in 287 N. Y. 61, 38 N. E. (2d) 131 and appear at R. 91-110.

Jurisdiction.

A statement as to jurisdiction appears in the petition pages 6-7 above.

Statement of the Case.

A summary statement of the facts is given in the petition pages 2-5 above.

Statutes Involved.

The statutes involved are set forth in an appendix attached to the brief.

POINT I.

The Federal Estate Tax Law does not finally determine the incidence of the tax imposed; on the contrary it expressly leaves this to be determined by the states in the exercise of their power to control the estates of their decedents.

We know of no Federal case which holds or even declares by way of dictum to the contrary of the succinct statement of Judge Hough concurred in as indicated above (Petition p. 9) by the Treasury Department, the Department of Justice, Congress and this Court that: "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax: it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree on the burden bearing, the state courts can settle the matter."

Section 812(d) and the circumstances under which it was adopted constitute a direction to the courts to so expound the provisions of the Federal Estate Tax Law. *Alexander* v. *Alexandria*, 5 Cranch. 1, 7-8.

In reaching a contrary construction, the Court of Appeals relied principally on Section 826(b) of the Internal Revenue Code (set forth in the appendix).

Section 826(b) was originally enacted in 1916 without detailed discussion as a part of the first federal estate tax act. It has been continued without change in succeeding revenue laws. Two years later Section 826(c) of the Internal Revenue Code was enacted (also set forth in the appendix).

Fairly construed, Section 826(b) means no more than that if some person other than the executor pays the tax, as he may well be compelled to do under the Federal law, such person is not to be foreclosed from an equitable con-

tribution from those who may be equally liable pursuant to state law for the payment of the tax. In providing in Section 826(a) for the collection by the federal authorities of the tax from persons other than the executor, Congress in Section 826(b) hastened to add however that it was the purpose and intent of Congress that the tax should be paid out of the estate before its distribution in so far as was practical to do so and unless the will otherwise directed. We should suppose it clear that Congress by thus in effect describing the treatment which, in the absence of a contrary direction by will, *any* claim or expense of administration would receive—i.e., payment out of the estate before distribution so far as practicable—indicated its intent *not* to interfere in the determination of the final incidence of the tax any more than it would in determining the final incidence of any other debts or claims, that being the province of State law.

The provision for the executor paying the tax before *any* distribution would result normally in its falling mathematically, under State law, as do debts and administration expenses, upon the residuary estate. *Hepburn* v. *Winthrop*, 83 F. (2d) 566 (App. D. C.); *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265; *People* v. *Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge*, 198 Iowa 373, 199 N. W. 320; *Corbin* v. *Townshend*, 92 Conn. 501,103 Atl. 647. But that constitutes no command or expression of intention by Congress immutably fixing its incidence upon the residuary estate to the exclusion of any State legislation or judicial decision in respect thereof.

POINT II.

If the Federal Estate Tax Law is construed as silent or incomplete as to the ultimate incidence of the Federal tax, or even as definitely fixing for the purpose of the Federal statute the incidence of the tax, Section 124 of the Decedent Estate Law is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The Federal estate tax which the law requires the executor to pay is a tax imposed on an aggregate and artificial estate. Mathematically the actual testamentary estate may be insufficient to bear the total Federal estate tax because of the addition to it of non-testamentary property or it may be so reduced by the payment of that tax that there are insufficient assets or even no assets remaining to satisfy the specific and general legacies bequests and devises, let alone leave anything for residuary legatees.

Prior to 1930 in New York the *judicial* policy of the State was that the Federal estate tax in respect not only of property passing under a will but also of all other property included in the gross taxable estate (except insurance), was payable finally out of the residuary estate unless the will contained a contrary direction (*Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672).

Section 124 of the Decedent Estate Law enacted the *legislative* policy of the State. What it did was to change the emphasis—that is, to require apportionment as among all sharers (generally speaking) in what was the taxable estate unless the testator directed to the contrary. It assumed to protect what experience had shown to be those whom the testator preferred unless and to the extent only that the testator willed affirmatively to the contrary. This was a particular protection where large outside amounts

were brought into the taxable estate. (See Combined Reports of the Commission to Investigate Defects in the Laws of Estates, Reprint Edition, p. 388. This portion of the report is set forth as an historical note in 13 McKinney's Consolidated Laws of New York, p. 420.)

A state exercising its conceded power to control the estates of its decedents, will of necessity affect the same persons and property as will be affected by the levy and collection of the Federal tax. But as long as the state does not impose any real or actual restraint upon the fulfilment of the purpose of the federal taxing power (contrast *United States* v. *Snyder*, 149 U. S. 210), there can be no violation of the supremacy clause of the Federal Constitution.

That New York has the power to control the estates of its decedents has been reaffirmed only this year. *Irving Trust Co.* v. *Day*, U. S. , January 5, 1942.* To deny the state the power to exercise control over what remains of the estate after Federal taxes have been paid is required by no principle of constitutional law.

There is here no real repugnancy to the exercise of the Federal power and no obvious and appreciable injury. *Plummer* v. *Coler*, 178 U. S. 115, 137, 138; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Kelly* v. *Washington*, 302 U. S. 1, 9, 10; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Thompson* v. *Kentucky*, 209 U. S. 340, 348.

The requirement in the United States Constitution that Federal excise taxes shall be uniform throughout the United States would not appear to be a proper ground for holding state statutes to be unconstitutional, *Peacock* v. *Pratt*, 121 Fed. 772 (C. C. A. 9th). And the Federal statute construed so as to permit the states to determine the final in-

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* *Irving Trust Co.* v. *Day*, which has a direct bearing on the case at bar (*post* p. 20) was decided after the decision of the Court of Appeals on November 27, 1941.

cidence of tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

POINT III.

Section 124 of the Decedent Estate Law is valid as applied to the estate of Josephine del Drago where it does no more than impose a condition on her privilege of making a will.

Whatever meaning is placed upon Section 826(b) of the Internal Revenue Code, it specifically leaves the determination of the incidence of the tax to the testator's will. So also does Section 812(d). A will can have no force or meaning except as it is construed, regulated and affected by applicable state law upon which it depends for its existence. *Irving Trust Co.* v. *Day*, U. S. , January 5, 1942; *Matter of Bergdorf*, 206 N. Y. 309, 316, 99 N. E. 714, 717.

Consequently, by necessary implication, Congress has left unimpaired the authority of the states to determine the final incidence of the tax already paid to it through their power to impose a condition on the privilege of making a will.

Leaving the control of the privilege of making a will unhampered in this respect would interfere in no way with the amount or the collection of the Federal tax since no question would arise with respect thereto until after the tax had been paid. Having in mind that one of the avowed Congressional purposes in enacting an estate rather than a succession tax was to obviate the necessity of the federal government's determining the force or meaning of wills, it cannot reasonably be said that Congress intended to deprive the states of their normal powers in this respect over the wills of their decedents.

In *Irving Trust Co.* v. *Day*, this Court has taken occasion this year to reaffirm the fundamental proposition that the power of testamentary disposition is within the states' control and that the exercise of the testamentary privilege with a statutory condition attached will impose the consequences of that condition on the testator and his estate.

There can be no conflict between the Federal Estate Tax Law which in express terms permits the testator to direct the incidence of the Federal tax by will and Section 124 of the New York Decedent Estate Law which provides as a condition to the privilege of making a will that the testator shall be deemed in the absence of a contrary provision by him to have intended proration of Federal estate taxes as though such a clause were embodied in his will.

CONCLUSION.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

JOHN W. DAVIS,
OTIS T. BRADLEY,
ANDREW Y. ROGERS,
Counsel for Petitioner.

Dated, New York, N. Y., February 25, 1942.

APPENDIX

The Statutes Involved

Section 124 of the New York Decedent Estate Law (Laws of 1930, c. 709):

"§124. Apportionment of federal and state estate taxes; executor or administrator to deduct taxes from distributive shares.

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will,* shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that

* The only amendment to section 124 since its enactment in 1930 has been the addition in 1940 of a second exception clause, "and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument." Laws of 1940, c. 829, §13.

in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term 'persons interested in the estate' shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made

and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.".

Section 812(d) of the Internal Revenue Code (26 U. S. C. §812 (d)) (derived from Section 303 (a) (3) of Title III of the Revenue Act of 1926, as amended in 1932 (47 Stat. 282), without change).

Section 812 provides that for the purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate:

"(d) *Transfers for public, charitable, and religious uses.* The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate. (53 Stat. 123.)"

Section 826 of the Internal Revenue Code (26 U. S. C. §826) (derived from Section 314 of Title III of the Revenue Act of 1926 (44 Stat. 79) without change):

"§826. *Collection of unpaid tax*—(a) *Sale of property.* If the tax herein imposed is not paid on or be-

fore the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (53 Stat. 127.)"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941—No. ~~980.~~ 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,
Respondents.

REPLY BRIEF FOR PETITIONER IN ANSWER TO BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO.

Petitioner takes exception to the implication which respondents' brief would give that the present case is of little moment.

(1) It is suggested by respondents that Mrs. Del Drago's will was "only the draftsman's blunder". The minority opinion of the Court of Appeals pointed out (287 N. Y. 61, 86, 38 N. E. 2d 131, 143):

> "* * * The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section 124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could

by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. * * *"

Nor is experience in accord with respondents' statement. Petitioner's main brief points out (pp. 7, 8) that thousands of similar wills have been made in the last eleven years in reliance on section 124 of the New York Decedent Estate Law; that hundreds of pending estates are seriously affected by this decision; and that there are many wills of living persons drawn in the light of this section which cannot or will not be redrawn.

(2) Reference by respondents (p. 4) is made to two proposals now before the present Congress either of which it is asserted would render academic the issue here.

As a matter of fact, these proposals show or tend to show how seriously the decision of the Court of Appeals is regarded and that there is immediate need to remedy the situation by judicial or in the alternative by legislative action.

Moreover neither proposal for future legislation if enacted would remedy the situation in this estate or in the hundreds of others now in the process of administration in New York and Pennsylvania where the legislatures have acted or in other jurisdictions where the right to act has been asserted by judicial decision. Nor would these proposals render academic the fundamental question in this case of whether a State's judiciary in the absence of legislation or a State Legislature has not the full right and power to deal with the incidence of the federal estate tax after the tax "has been" paid.

It is not the purpose of this brief to answer respondents' various arguments as to the correct interpretation of the

Federal Estate Tax Law or the constitutional questions arising therefrom. The basic fallacy of their argument as to the interpretation of the Federal statute, however, may be briefly pointed out. Throughout their brief their position is that the federal estate tax is a tax imposed upon the estate and not upon any legacy and that for this reason it follows that the incidence of the tax falls upon the estate and not upon the beneficiaries (pp. 1, 3, 5). But the burden of the tax must, as Judge Hough pointed out (*Edwards* v. *Slocum*, 287 Fed. 651, 653 (C. C. A. 2d) aff'd 264 U. S. 61) fall on some beneficiary. It is therefore no answer to the question in this case to say that Congress intended the incidence to be upon the estate and not upon the beneficiaries. The question in the present case is whether Congress intended in this respect to provide as between beneficiaries which beneficiaries should bear the burden of this tax after it has been paid in full to the Federal Government to the exclusion of action by the states.

It is no answer to say as respondents do that Judge Hough fell into error because "a considerable mass" of so-called "proof" was not called to his attention. That is not the point, as counsel must realize. The fact of significance is that counsel for the Government, in their briefs in the United States Supreme Court, accepted and stood squarely on Judge Hough's decision, that Mr. Justice Holmes and Chief Justice Taft in their opinions recognized that fact, and that after this Court in that case had decided against the Government, the Congress enacted this very position as part and parcel of the Federal Estate Tax Law (section 812(d), Internal Revenue Code; see petitioner's brief, pp. 9, 10).

An effort is made by respondents, from Statement to Conclusion (pp. 1, 22) to confine the attention of this Court to a single section, section 826(b) of the Internal Revenue

Code and then to argue that by reason of that section, petitioner has failed to disprove repugnancy. It would seem to be obvious that where a claim of direct repugnancy is asserted by respondents between a remedial State statute and a Federal statute, one is called on to consider the Federal Act in its entirety and scarcely can rely on one of its incidental sections.

In any event respondents have failed to meet the proposition that Congress having expressly left it to testators to determine by will the final incidence of the Federal estate tax by necessary implication has left unimpaired the authority of the States to determine the final incidence of the tax after payment through the power of the States to control the will-making privilege. There is therefore no conflict between the Federal Estate Tax Law and section 124 of the New York Decedent Estate Law.

In *Irving Trust Co. v. Day*, 314 U. S. ....., this Court has taken occasion to reaffirm the fundamental proposition that the power of testamentary disposition is within the states' control and that the exercise of testamentary privilege with a statutory condition attached will impose the consequences of that condition and thus effect the estate disposed of by the will so interpreted. As was there said:

> "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

Conclusion.

The issue in this case has not arisen, as asserted by respondents (p. 22), "in narrow and unusual circumstances". It is a live question in all States and is now pending by virtue of legislation in both New York and Pennsylvania.

The four to three vote by the Court of Appeals is in direct conflict with the determination of the New York State legislature based upon fact finding reports of two New York State Commissions and is also in conflict with like legislation in Pennsylvania. The importance of the situation could hardly be over-stated, as is partly indicated by the very bills in Congress which respondents have brought to the Court's attention.

Respectfully submitted,

John W. Davis,
Otis T. Bradley,
Andrew Y. Rogers,
Counsel for Petitioner.

Dated: New York, N. Y., March 23, 1942.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 30.

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

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Respondents.

No. 30.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted on March 30, 1942 to review a decision of the Court of Appeals of the State of New York which determined Section 124 of the New York Decedent Estate Law to be invalid as repugnant to the Federal Estate Tax Law and to the supremacy and uniformity clauses of the Constitution of the United States.

Section 124 of the New York Decedent Estate Law (Chap. 709 of the Laws of 1930 set forth in the appendix), provides in substance that whenever it appears upon an accounting by an executor or other fiduciary that such executor or other fiduciary has paid a federal estate tax upon or with respect to any property required to be included in the gross estate of the decedent under the Fed-

eral Estate Tax Law, the amount of the tax so paid, except where the testator otherwise directs in his will, shall be equitably prorated among all the persons sharing in such taxable estate in proportion to their respective benefits.

Opinions Below.

The opinion of Surrogate Foley (R. 55) is reported in 175 Misc. 489, 23 N. Y. S. (2d) 943. The opinion of the Court of Appeals by Judge Rippey with whom Judges Finch, Lewis and Conway concurred (R. 62) reversing the Surrogate, and the dissenting opinion therein by Judge Desmond in which Chief Judge Lehman and Judge Loughran joined (R. 75) are reported in 287 N. Y. 61, 38 N. E. (2d) 131.

Jurisdiction.

The highest court of the State of New York having determined a state statute to be repugnant to the laws and Constitution of the United States, this Court had jurisdiction to grant a writ of certiorari pursuant to the provisions of Section 237 (b) of the Judicial Code (28 U. S. C. §344 (b)).

Statement of the Case.

Josephine del Drago died October 8, 1937, a resident of New York, leaving a will dated March 27, 1934, which was admitted to probate by the Surrogate's Court of New York County on April 6, 1938, and letters testamentary were issued by that Court on the same date (R. 15, 16, 32). Her estate was upwards of $1,000,000 (R. 19). By her will, after providing for certain small cash bequests and specific

bequests of her personal effects, she bequeathed $300,000 to her husband outright, and created a trust of $200,000 for the benefit of her stepson for life, with gift over upon his death. The residue of her estate she disposed of in trust for the benefit of her husband for life, with a gift over upon his death. Her will contained no reference to estate taxes and no direction with respect to the portion of the estate to be charged therewith (R. 49).

On January 31, 1940, the executors duly commenced a proceeding in the Surrogate's Court of New York County for a judicial settlement of their account (R. 1). Petitioner was appointed special guardian to represent the interests of the infant remaindermen of the residuary trust (R. 1, 2).

The account showed that the executors had paid approximately $230,000 to the Collector of Internal Revenue on account of the federal estate tax assessed against the estate (R. 24). By their petition and account, the executors asked the Surrogate to determine whether this payment should be equitably apportioned among all persons beneficially interested in the estate, pursuant to Section 124 of the New York Decedent Estate Law, the will being silent (R. 18, 24).

Giovanni del Drago and Marcel del Drago, beneficiaries of the outright bequest of $300,000 and the bequest in trust of $200,000 respectively, respondents here, answered the petition, setting forth specific objections to the constitutionality of Section 124 of the Decedent Estate Law and claiming that for this reason, no part of the amount of the tax should be apportioned against their general legacies but that the entire amount of the tax should be charged against the residuary trust (R. 24, 28). Petitioner, representing the infant remaindermen of the residuary trust, in his report as special guardian contended that the amount of the federal tax should be apportioned equitably among all beneficiaries according to the settled practice under Sec-

tion 124, and should not be charged wholly against the residuary trust (R. 32).

The chief constitutional ground asserted by the objectants was that Section 124 of the Decedent Estate Law was repugnant to the provisions of the Federal Estate Tax Law and therefore violated Article VI (the supremacy clause) of the Constitution of the United States. They also asserted unconstitutionality under Article I, Section 8 (the uniformity clause). The other grounds were not pressed in the Court of Appeals or considered by that Court.

After a hearing (R. 35), the constitutional objections of respondents Giovanni del Drago and Marcel del Drago to the apportionment of the federal tax were overruled by Surrogate Foley (*Matter of del Drago*, 175 Misc. 489, 23 N. Y. S. (2d) 943) (R. 55) and decrees dated November 19, 1940 and December 24, 1940 were duly made and entered accordingly in the Surrogate's Court of New York County (R. 5, 14).

From the parts of these decrees of the Surrogate's Court of New York County holding Section 124 constitutional and directing proration of the tax, the general legatees, Giovanni del Drago and Marcel del Drago, as authorized by the New York Constitution (Article VI, Section 7 (3)) and the Civil Practice Act (Section 588 (3)) appealed directly to the New York Court of Appeals on the ground that the only question involved on the appeal was the validity of a state statute under the Constitution of the United States.

The Court of Appeals, on November 27, 1941, reversed the determination of the Surrogate on the ground that Section 124 of the Decedent Estate Law was unconstitutional (*Matter of del Drago*, 287 N. Y. 61, 38 N. E. (2d) 131) (R. 62).

The Court of Appeals construed the Federal Estate Tax Law (which imposes a tax on the transfer of a decedent's estate) as providing that unless the testator otherwise directs, the weight of the federal tax must fall upon the residuary beneficiaries. There is no section of the Federal Estate Tax Law which in terms so provides and the construction adopted by the Court of Appeals was based upon its interpretation of the Federal Estate Tax Law and particularly Section 826 (b) of the Internal Revenue Code.

Having so construed the Federal Estate Tax Law it determined that Section 124 of the New York Decedent Estate Law (which requires that the burden of the Federal estate tax, after the state fiduciary "has paid" it to the federal collector, be apportioned among all beneficiaries unless the testator otherwise directs) was in conflict with the federal law.

By reason of this alleged conflict, it held that Section 124 of the New York Decedent Estate Law violated so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The Court of Appeals further believed, as we read its opinion (R. 71), that even if the Federal Estate Tax Law failed specifically to fix the ultimate burden of its tax, nevertheless mere Congressional silence did not give permission to the state so to do and therefore the supremacy clause prevented a state from legislating upon the subject.

Finally the Court of Appeals determined that a state statute could not legislate with respect to the burden of a federal tax by reason of so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

On January 19, 1942, petitioner moved for reargument in the Court of Appeals. This motion was denied on January 22, 1942 (R. 83). On the same date, petitioner moved that the order of remittitur of the Court of Appeals be amended to set forth the grounds of the decision. This motion was also denied on January 22, 1942, upon the ground that the Court's opinions showed that upon the appeal, a federal question was presented and necessarily passed upon (R. 83).

On February 16, 1942, an order was made by the Surrogate's Court of New York County upon the remittitur of the Court of Appeals (R. 84). On March 30, 1942, certiorari was granted by this Court (R. 89).

The Statutes Involved.

The statutes involved are the Federal Estate Tax Law and Section 124 of the New York Decedent Estate Law.

The Federal Estate Tax Law applicable to the estate of this decedent, who died on October 8, 1937, is Title 3 of the Revenue Act of 1926 as amended and Title 2 of the Revenue Act of 1932 as amended. For convenience, instead of referring to particular sections of these Revenue Acts, reference will be made to the Internal Revenue Code, the sections of which, relevant to the present controversy, are taken without change from these prior Revenue Acts. Certain sections of the Internal Revenue Code (Sec. 812(d) and Sec. 826), which are to be discussed in detail are set forth in the appendix to this brief.

Section 124 of the New York Decedent Estate Law (Chap. 709 of the Laws of 1930) determined to be repugnant to the Federal Estate Tax Law and the Federal Constitution is also set forth in full in the appendix.

Section 249-t of Article 10-C of the New York Tax Law (Chap. 710 of the Laws of 1930), in so far as it incorporated by reference the provisions of Section 124 of the New York Decedent Estate Law, was also apparently included in the condemnation of the Court of Appeals (R. 75). Section 249-t on its face appears to have reference only to the apportionment of state estate taxes, a matter expressly not considered by the Court of Appeals and not in issue here (R. 75). But in any event since it raises no issue apart from that raised by Section 124 of the Decedent Estate Law, it will not be further referred to or considered here.

The Question Presented.

The question is whether Section 124 of the New York Decedent Estate Law is repugnant to the Federal Estate Tax Law and violates the supremacy or uniformity clauses of the Federal Constitution.

The Importance of the Question.

In order that the far-reaching effect of the decision made by the New York Court of Appeals in the present case be fully understood it is appropriate to review briefly the history of the application of the federal estate tax to the estates of New York decedents.[1]

The general scheme adopted in the first modern Federal Estate Tax Law enacted in 1916 has been followed in all subsequent enactments. It imposed a tax upon the trans-

[1] In the last three years for which figures are available (1936-1938) federal estate taxes from New York decedents amounted to over $300,000,000—over one-third of the total estate taxes for the country as a whole during the same period (U. S. Treasury Department, Statistics of Income for 1936, Part 1, p. 69; idem for 1937, Part 1, p. 96; idem for 1938, Part 1, p. 248).

fer of the owner's estate at his death (Revenue Act of 1916, secs. 200 *et seq.*; 39 Stat. 777). The amount of the tax was to be fixed by applying progressively graduated rates to the value of the net taxable estate. The net taxable estate was determined by deducting a specific exempted sum and the amount of debts, administration expenses and certain other specified items from the gross taxable estate. The value of the gross estate was determined by the inclusion of the value of the property subject to the charges against the estate, the value of *inter vivos* transfers in contemplation of or intended to take effect at death and the value of interests held jointly by the decedent and another.

The rates then provided were low. For example, a net taxable estate of $100,000 (after deductions and the specific exemption) was subject to a tax of only $1,500. A net taxable estate of $1,000,000 was subject to a tax of only $41,000.

In 1919 the New York Court of Appeals decided *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672. The testatrix in that case died on January 3, 1917, leaving a will executed in 1907, in which after certain cash bequests she created a residuary trust of the bulk of her estate. Her estate was subject to the 1916 Federal Estate Tax Law. Her executors having paid a federal estate tax showed in their account in the state court that each cash bequest was charged with a portion of the amount of the Federal estate tax paid by them. Objections were filed by the cash legatees who contended that the entire amount of the tax should be borne by the residue. The Court of Appeals sustained the objections of the cash legatees. This case in the absence of any opposing state statute established a judicial rule in New York that executors should charge the entire amount of the federal estate tax to the residue when the testator had not provided to the contrary.

In 1924 the New York Court of Appeals in *Farmers Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633 extended this rule (Lehman, J., now Chief Judge, who dissented in the present case, writing) to charge the residuary beneficiaries not only with the tax resulting from true estate property but with that part of the tax which resulted from the inclusion of an *inter vivos* trust in the taxable estate.

Experience proved that the application of this rule in many cases resulted in inequities and hardship to the immediate members of the decedent's family who were generally the residuary legatees (see *Matter of Mary Benson*, 120 Misc. 136, 198 N. Y. Supp. 663; 1 Paul, Federal Estate and Gift Taxation (1941) 774; Karch, The Apportionment of Death Taxes, 54 Harv. L. Rev. (1940) 10, 34; Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 135 (1933)).

In 1927 a Commission was appointed by the New York Legislature to investigate defects in the laws of estates in New York (Chapter 519, Laws of 1927). This Commission was composed of fifteen members including the surrogates of four of the largest communities in the State, and legislators and lawyers eminent in the field of decedents' estates (Report of the Commission, N. Y. Legis. Doc. [1928] No. 70, p. 5). The painstaking work of this Commission and the many improvements in the laws of decedents' estates resulting therefrom are too well known to require enumeration. The constitutionality of one of these legislative reforms designed for the further protection of the surviving spouse has recently been sustained by this Court. *Irving Trust Co.* v. *Day*, 314 U. S. 556.

In the fall of 1929 the Commission, at the invitation of the Governor and the State Tax Commission, took under

advisement improvements in the law of inheritance taxation.[1] In cooperation with the State Tax Commission it recommended:

(1) abolition of the old New York transfer tax and in its place a New York estate tax similar to the federal estate tax (Chapter 710 of the Laws of 1930);

(2) legislation for compromising the amount of the transfer tax upon certain estates where under the old transfer tax final determination of the tax had been postponed pending the happening of contingencies (Chapter 711 of the Laws of 1930);

(3) legislation to provide a method of equitably apportioning the estate tax (both federal and state) as against the respective benefits derived by the various persons interested in the estate where the testator did not direct otherwise (Chapter 709 of the Laws of 1930, Report of the Commission, N. Y. Legis. Doc. [1930] No. 69, p. 195).

In its note to this last provision the Commission reported in part (N. Y. Legis. Doc. [1930] No. 69, p. 227; (this note, printed with the original bill as presented to the state legislature, appears in 13 McKinney's Consol. Laws of N. Y., p. 420)):

> "The principal objection to an estate tax has been that where the decedent dies leaving a will, and makes no provision therein to the contrary, the en-

[1] This Court in relating the history of inheritance taxation in New York has taken notice of this "inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs", *Whitney* v. *Tax Commission*, 309 U. S. 530, 536 (wherein the constitutionality of certain legislation designed to cover the hiatus between the old New York transfer tax and new estate tax was upheld).

tire burden of the tax must be borne by the residuary legatee or legatees. Experience has demonstrated that in most estates the residuary legatees are the widow, children, or nearer and more dependent relatives. This has been one of the objections to the Federal Estate Tax Law in New York. The burden of the tax has been imposed upon the residuary legatees not only as to the property passing under the will, but also upon transfers whether by gift or *inter vivos* trust, or other form of transfer taking effect at death. These transfers are included both in the Federal Estate Tax Law and under the proposed New York Estate Tax Law as subject to taxation. Thus the residuary legatees have been compelled to pay the entire estate tax, including the tax assessed on testamentary transfers and those taking effect at death. It was held by the Court of Appeals that the Federal Estate tax is required to be paid out of the general estate without any right of apportionment among the respective beneficiaries (Farmers' Loan & Trust Co. *v.* Winthrop, 238 N. Y. 488; Matter of Oakes, 248 N. Y. 280; Matter of Hamlin, 226 N. Y. 407).

The foregoing proposed section 124 of the Decedent Estate Law was drawn by the commission appointed to investigate defects in the laws of estates and the representatives of the New York State Tax Commission for the purpose of providing statutory authority for an equitable apportionment of the estate taxes—both Federal and State—as against all transfers of property included in the gross estate. The section as drafted authorizes the surrogate in an accounting or other appropriate proceeding (where all persons interested shall have been given notice) to hear the respective claims of the parties and to make an equitable proration or apportionment of the estate taxes. The decree of the surrogate may direct the payment by any transferee of the share

of the taxes apportioned against such transferee. Of course, if the will directs the method or source of the payment of the estate taxes no apportionment can be made in violation of its terms; thus the testator, in his discretion, may provide for the method and source of the payment of the tax. In Edwards *v.* Slocum, 287 Fed. Rep. 651 (aff'd 264 U. S. 61), Judge Hough of the United States Circuit Court of Appeals, Second Circuit, pointed out that the Federal Estate Tax Act does not determine the incidence of the tax which it imposes, but that each state is at liberty to determine according to its own laws in what manner the federal estate tax shall be borne by the persons interested in the estate (See also Hill *v.* Grisson, 299 Fed. Rep. 641)."

Pursuant to the concurrent recommendation of these two state commissions Section 124 of the New York Decedent Estate Law was enacted in 1930 at a time when declining values accentuated the inequities of the existing rule.

The effect of this enactment was to change the then existing judicial rule in New York and require that the amount of the federal estate tax be apportioned among all beneficiaries of the taxable estate unless the testator directed to the contrary.

Since 1930 it has been customary for draftsmen of wills to advise their clients that if the latter say nothing, the burden of death duties will follow the benefit and that if their clients should wish taxes to be paid out of the residuary estate, the will must so provide.

Between the time of its enactment in 1930 and the decision in the present case in November of 1941, Section 124 was continuously applied by the New York courts and has been frequently recognized by the Court of Appeals. *Matter of Duryea*, 277 N. Y. 310, 14 N. E. (2d) 369; *Matter of Rogers*, 249 App. Div. 238, 291 N. Y. Supp. 815, leave to

appeal denied 273 N. Y. 680; *Matter of Stanfield*, 257 App. Div. 932, 12 N. Y. S. (2d) 1022, leave to appeal denied 281 N. Y. 887. It has withstood attack on other constitutional grounds in the Court of Appeals. *Matter of Scott*, 274 N. Y. 538, 10 N. E. (2d) 538, cert. denied 302 U. S. 721.

It is no exaggeration to say that in thousands of estates in New York federal estate taxes have been apportioned in accordance with its terms.

Then eleven years after its passage, the Court of Appeals in this case has declared it to be invalid so far as federal estate taxes are concerned. The immediate consequences of the decision are enormous. It may fairly be said that there are hundreds of estates now in the process of administration in New York which are seriously affected. In the intervening eleven years the federal rates have been increased[1] and interests not originally included in the gross taxable have been added to it, *e. g.* irrevocable trusts where the grantor has reserved a life interest and reversionary interests (Internal Revenue Code §811; *Helvering* v. *Hallock*, 309 U. S. 106). Testators, whose wills are now in the process of administration, had sought, under the guide set up in Section 124, to secure for the natural objects of their bounty certain portions of their property. In many instances these carefully made plans will be wrecked if the decision stands.

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[1] The following will serve as an example:

Net Taxable Estate	Tax Under Revenue Act of 1926 (applicable to decedents dying between 1926 and 1932)	Tax Under Revenue Act of 1941 (applicable to decedents dying after September 21, 1941)
$ 100,000	$ 300*	$ 20,380*
1,000,000	9,700*	290,260*
10,000,000	270,700*	5,014,520*

* After maximum credit allowed for state inheritance taxes.

There are many persons now living whose wills have been drawn in the light of Section 124. Many testators in the natural course of human conduct will not, and many because of incapacity or infirmity cannot, revise existing wills to make the changes rendered necessary by this decision to preserve their actual wishes. Their testamentary plans are jeopardized or destroyed.

The question involved here is also of importance in Pennsylvania which in 1937 enacted a statute similar to Section 124 of the New York Decedent Estate Law (Purdon's Pa. Stat. Ann. 20 P. S. §844) and in other states which by judicial decision have assumed the right to deal locally with the incidence of the federal estate tax.

A Specification of the Errors to be Urged.

The Court of Appeals erred:

1. In construing the Federal Estate Tax Law as placing the ultimate burden of the tax upon the net residuary estate where the will is silent, and, having so construed the Federal Estate Tax Law, in holding Section 124 of the Decedent Estate Law to be repugnant to the Federal Estate Tax Law and to so much of Article VI of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

2. In holding that even though Congress may have failed to fix expressly the ultimate burden of the tax, a state may not constitutionally supplement such omissions from the Federal act.

3. In holding that Section 124 of the Decedent Estate Law was repugnant to so much of Article I of the Federal Constitution as provides that Federal excises shall be uniform throughout the United States.

Summary of Argument.

I.

The Federal Estate Tax Law provides only for the payment of the tax and does not care upon whom the ultimate burden falls. Section 124 of the New York Decedent Estate Law does not conflict or interfere with the purposes of the federal statute.

The Federal Estate Tax Law imposes a tax on the transfer of the decedent's estate, measured by its aggregate net value. It requires an executor, a state fiduciary, to pay out of the aggregate funds in his hands the tax so imposed. After the tax has been paid to the collector the estate is closed so far as the Federal Government is concerned.

Section 124 of the New York Decedent Estate Law, by its express terms, does not become operative until the state fiduciary "has paid" the tax. It is only at a later date, when the state fiduciary comes to account for his acts as such fiduciary before the appropriate tribunal and shows that he "has paid" the tax, that the Surrogate in directing distribution of the estate equitably apportions the amount of the tax paid among the several beneficiaries pursuant to Section 124 if the Will does not provide otherwise.

Such an apportionment does not affect the amount or the collection of the tax by the Federal Government.[1] The Federal Government has no interest and is not concerned

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[1] Where a will makes a residuary bequest to charity, the way in which the burden of the tax falls may affect the amount of the tax because in this instance the federal statute itself directs that the burden of the tax as determined by state law shall be taken into consideration in computing the amount of the charitable deduction. This is discussed at pages 40-46, *infra*.

with the matter. There is no conflict or interference with the operation of the Federal Estate Tax Law or with its purposes. Such purposes are wholly fulfilled when the tax is paid.

II.

Section 124 of the New York Decedent Estate Law does not violate the supremacy clause of the Federal Constitution there being no actual conflict or interference.

Applicable decisions of this Court establish that a state statute, within the ordinary sphere of state legislation, will not be stricken down unless there is actual interference with the operation of a federal statute or with its purposes.

The power of the Federal Government to levy and collect an estate tax is granted by the Constitution.

The power of the states to regulate the distribution of estates is reserved to them under the Constitution. Section 124 of the Decedent Estate Law providing for apportionment of the burden of the federal tax among the several beneficiaries was enacted pursuant to this power. Its effect is to regulate the distribution of the balance of the estate remaining after taxes have been paid.

If there was an actual conflict between these state and federal statutes, it might be necessary to ascertain which of the two statutes exceeded its constitutional powers. For the supremacy clause lends no support to a federal statute which for purposes irrelevant to its power to levy and collect taxes arbitrarily interferes with rights reserved to the states. Since, however, no actual conflict exists in this case—the federal purpose of laying and collecting a federal

tax (U. S. Const., Art. I, Sec. 8) being completed before the state statute by its very terms commences to operate—both statutes are wholly consistent and therefore must be sustained.

III.

There is not even a theoretical conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law. By its terms the Federal Estate Tax Law does not fix the final burden of the tax; it leaves this determination to the law of the state having jurisdiction over the estate.

The New York Court of Appeals did not attempt to show where Section 124 actually interfered with the federal statute or its purposes. It construed the federal law as providing that the burden of the tax must fall on the residuary estate unless the testator otherwise directs. Because the state statute provides that the burden of the tax after its payment shall be equitably apportioned among all beneficiaries unless the testator declares to the contrary, the majority found a technical conflict between the two statutes. But the majority of the Court of Appeals incorrectly construed the federal law.

The federal law leaves the burden of the tax to state law. So construed not even a theoretical repugnancy exists between the statutes. So construed the federal statute does not violate the requirement of the Federal Constitution of geographic uniformity.

IV.

Section 124 of the New York Decedent Estate Law is valid as applied to Josephine del Drago's estate because it does no more than impose a condition on her privilege of making a will. Congress by necessary implication left this control of the will making privilege to the states by expressly permitting a will maker to determine the final burden of the tax.

The Federal Estate Tax Law expressly authorizes a testator to determine the incidence of the tax by his will.

It is therefore necessary to examine Mrs. del Drago's will to ascertain its meaning. It is well settled that since she was domiciled in New York the meaning and effect of her will is to be governed by the law of New York.

Admittedly her testamentary document is silent on the subject of estate taxes, but her silence under New York law means that taxes must be apportioned among the several beneficiaries as indeed Surrogate Foley pointed out (R. 57). For Section 124 says that unless the testator specifically provides otherwise, he is presumed to have intended proration of taxes. Such a provision is a usual and valid condition to the privilege of making a will; or if not a condition to its making, is a valid canon for its construction.

Since the federal law concededly permits the burden of taxes to be fixed by will, and since Mrs. del Drago has done so by her silence, no conflict can exist and no question of repugnancy arises.

POINT I.

The Federal Estate Tax Law provides only for the payment of the tax and does not care upon whom the ultimate burden falls. Section 124 of the New York Decedent Estate Law does not conflict or interfere with the purposes of the federal statute.

Section 124 does not conflict with the purposes or aims of the federal tax law, the sole purpose of which when first enacted in 1916 was to increase the revenue of the Federal Government to meet preparedness appropriations (53 Cong. Rec. 10657). This purpose is completed so far as an individual estate is concerned when the state fiduciary has paid the tax to the federal collector.

Subsequent to 1916 rates were greatly increased. If it be said that the increase in rates was not only to raise additional revenue but, in the case of large estates at least, to exact high taxes with the purpose of reducing concentrations of wealth (1 Paul, Federal Estate and Gift Taxation (1941) 28 *et seq.*), this aim too is accomplished upon the exaction of the tax and its payment to the collector. It is no part of the purpose or aim of federal law to determine which of the several estate beneficiaries shall bear the final burden of the tax after the collector has received the tax; the law expressly authorizes a testator to determine this burden as he chooses (Internal Revenue Code, Sections 826 (b), 812 (d)).

The facts in the case at bar will serve to illustrate the total absence of any repugnancy between the federal and state statutes.

This decedent died on October 8, 1937, leaving an estate of upwards of $1,000,000. Pursuant to the Federal Estate Tax Law, which requires the executor to file a return and pay the tax, such a return was filed and the tax amounting to approximately $230,000 was paid and the state fiduciaries obtained their tax receipt. The estate then became closed so far as this payment to the Federal Government was concerned. The estate had previously come within the orbit of the federal statute and the terms of the statute had been complied with.

After this payment, the executors brought a proceeding in the appropriate state court for judicial approval of their acts and transactions as fiduciaries of the estate (R. 1) asking certain instructions with respect to the disposition of the balance of the estate remaining in their hands after the payment of the charges against the estate including this tax payment (R. 17). The Federal Government was not an actual, necessary, or proper party to this proceeding.

In this state court proceeding Section 124 of the New York Decedent Estate Law became then operative. Pursuant to its terms the Surrogate decreed that the amount of the tax which had been paid over a year before to the Federal Government should be equitably apportioned among all of the various beneficiaries under the will and the balance of the estate be distributed accordingly. This determination of the Surrogate was of no more concern to the federal estate tax authorities than if the Surrogate had then determined that the will was invalid and the balance of the estate should pass as intestate property. It was a question which involved only the beneficiaries under the will or, in the case of intestacy, the next of kin.

POINT II.

Section 124 of the New York Decedent Estate Law does not violate the supremacy clause of the Federal Constitution there being no actual conflict or interference.

The right of the Federal Government to impose an estate tax arises from the express grant of power to Congress contained in the Federal Constitution (Art. I, Sec. 8) to lay and collect taxes. *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust* v. *Eisner*, 256 U. S. 345.

In *Knowlton* v. *Moore*, it was argued that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, the levy by Congress of a tax on inheritance in any form was beyond the power of Congress and an interference by the Federal Government with a matter which fell within the reach of state legislation alone.

In rejecting this contention and in holding that Congress could impose excise taxes irrespective of the source of the transfer taxed this Court at the same time acknowledged that the power to regulate the transmission of property was a matter exclusively for the states. See also *United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249.

In *Irving Trust Co.* v. *Day*, 314 U. S. 556, the fundamental proposition that control of the transmission of property at death is a matter for the states, was recently reaffirmed.

The Federal Government has never in fact assumed the right to regulate inheritances. Alexander Hamilton considered such regulation clearly beyond the power of the

Federal Government. He said (The Federalist, No. XXXIII (1788) at p. 213 (Tudor 1937)):

> "Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?"

Thus the power of the Federal Government to tax the transmission of property at death does not arise from and is wholly distinct from the power of the states to regulate the transmission of such property.

The power of the Federal Government to tax is not an exclusive power. The several states have the power to and do impose death taxes. By 1932 all except one state in the Union had some form of death tax. (Reports to the Joint Committee on Internal Revenue. Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 58 (1933)).

The co-existence of the Federal and state powers to tax has always been recognized. Hamilton, The Federalist, No. XXXII (1788) p. 206 (Tudor 1937); *Gibbons* v. *Ogden*, 9 Wheat. 1, 197; *Transportation Co.* v. *Wheeling*, 99 U. S. 273; *United States* v. *Perkins*, 163 U. S. 625; *Frick* v. *Pennsylvania*, 268 U. S. 473, 498.

It is important in considering any question of inconsistency to have in mind the non-regulatory non-exclusive character of the Federal power involved as distinguished from the state power which New York has exercised for the past eleven years under Section 124 of the Decedent Estate Law which places a condition on the testamentary privilege.

Attempted analogies in the relationship of other state laws to the exercise of other federal powers such as the power over interstate commerce, which may be both exclu-

sive and regulatory, are more likely to confuse than to clarify. Such supposed analogies led the Court of Appeals to the erroneous conclusion that even silence on the part of Congress with respect to the incidence of its tax would preempt the field and make any action by the states unlawful.

But for the reasons stated above, the levy or collection of the federal tax is not and cannot be disturbed by regulating the distribution of the balance of the estate remaining after the tax has been paid; the purposes of the federal statute have been fulfilled upon the payment of the tax and it is no part of the purpose of the federal government to direct upon which beneficiaries the burden of the tax shall fall.

It is not intended to deny to the Federal Government the power of directing upon whom the burden of its tax should fall after its payment in a case where such direction could be shown to be a reasonable and necessary adjunct to the exercise of its taxing power. But if the Federal Government should without reason seek to control the burden of its tax after its payment so as to render sterile the states' power to regulate the distribution of an estate, would not the question arise as to whether or not the federal statute had exceeded congressional power?

The supremacy clause goes no further than to sustain federal statutes exercised pursuant to federal powers. It does not sustain any exercise of the federal taxing power which encroaches upon rights reserved to the states. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287.

But this question need not be further discussed or answered here. It has been pointed out that the two statutes in the present case are in no wise inconsistent.

In dealing with alleged conflicts between coordinate powers it is necessary to determine whether any conflict in

fact exists. If no such conflict exists the exercise of both the state and federal powers is sustained. This court has upheld other state legislation in other situations involving alleged conflicts between coordinate powers where there was more appearance of actual conflict than in this case.

In *Whipple* v. *Martinson*, 256 U. S. 41, for instance it was alleged that a state statute regulating the sale of narcotics was invalid because it conflicted with the federal revenue anti-narcotic drug act. The federal statute permitted licensed physicians to dispense drugs; the state statute did not. In upholding the state statute the Court said at page 46:

> "There is certainly nothing in this state enactment, as construed by the Supreme Court of Minnesota, which interferes with the enforcement of the federal revenue law, and we agree with the state court that there is no conflict between the enactments such as will prevent the State from enforcing its own law upon the subject."

In *Plummer* v. *Coler*, 178 U. S. 115, there was an asserted conflict between the exercise of a conceded federal power to borrow money and the exercise of a conceded state power to levy an inheritance tax. A New York testator had bequeathed $40,000 in United States bonds to his executor in trust. The bonds had been issued by the federal government exempt "from * * * taxation in any form by or under state municipal or local authority". New York State sought to impose its inheritance tax on the *bequest*.

In upholding the state statute against this attack the court said at pages 137, 138:

> "But when the effort is made, as is the case here, to establish the unconstitutional character of a particular tax by claiming that its remote effect will be

> to impair the borrowing power of the government, courts in overturning statutes, long established and within the ordinary sphere of state legislation, ought to have something more substantial to act upon than mere conjecture. The injury ought to be obvious and appreciable."

In holding applicable to national banks a state statute prohibiting branch banking this court said in *First Nat'l Bank* v. *Missouri*, 263 U. S. 640, 659:

> "Clearly, the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created or interfere with the discharge of its duties to the government or impair its efficiency as a federal agency."

Recently this court has sustained the imposition of the New York income tax upon the salary of an attorney for the Federal Home Owners' Loan Corporation after finding that no actual burden was imposed upon the national government by the levy of the tax. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480.

It has already been pointed out that attempted analogies to cases involving disputes between federal and state action in the field of interstate commerce are of doubtful relevance to the case at bar. Nevertheless there are a number of cases in a portion of this field which illustrate the application of the rule which we apply here. In considering them it must be remembered that in the field of interstate commerce, since the power to regulate is expressly vested in Congress, federal statutes are undoubtedly supreme. *Gibbons* v. *Ogden*, 9 Wheat. 1. On the other hand, since the burden of the taxation on the several beneficiaries of estates is more closely connected with regulation of estates than with taxation, at least a serious doubt exists as to the application of the supremacy clause in the event of conflict.

The cases in the limited field of interstate commerce which might to some extent be analogous to the present case are those cases dealing with alleged conflicts between the exercise by a state of its police power and the exercise of a federal regulation of interstate commerce concerning subjects not demanding uniformity of regulation (*i.e.* excluding those cases where state action is altogether inadmissible even in the absence of federal action).

Even in the long line of cases where the Federal Government is supreme and the states may act only in the limited field which the Federal Government has not occupied the principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." *Kelly* v. *Washington*, 302 U. S. 1, 10; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri K. & T. R. Y. Co.* v. *Haber*, 169 U. S. 613, 623, 624; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Mintz* v. *Baldwin*, 289 U. S. 346, 350; *Savage* v. *Jones*, 225 U. S. 501, 533.

If the test is stated in broader terms and the attempt is made to ascertain in the present case whether Section 124 of the New York Decedent Estate Law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" the result is the same. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67.

This federal act "can, with no propriety of language, be said to come into conflict with the law of a state, whose operation only begins when the law of Congress ends." See *New York* v. *Miln*, 11 Pet. 102, 138.

In the present case there not only is no conflict, but an actual accommodation of the power of the State to the rights of the Federal Government, and a harmonious exercise of the respective sovereignties of each, preserving to each necessary power. See *Thompson* v. *Kentucky*, 209 U. S. 340, 348.

We are not discussing a situation where conflict is direct and positive. We do not say that a state may enact a valid statute interfering with the collection of the federal tax (*United States* v. *Snyder*, 149 U. S. 210) or attempt to dictate the property which might be included in the gross estate so as to affect the amount of the tax in the absence of express or implied authority from Congress to do so. *Burnet* v. *Harmel*, 287 U. S. 103; *Lyeth* v. *Hoey*, 305 U. S. 188.

Nor do we seek a rule which would treat the power of the states to regulate the administration of a decedent's estate as unlimited. A state cannot of course use this power to discriminate against national banks in favor of its own banks in the right to act as executor. *Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17. Nor can a state exercise its power over estates of aliens, in contradiction to treaty obligations of the federal government. *Santovincenzo* v. *Egan*, 284 U. S. 30.

We do urge, however, that a state may fully exercise its power to regulate the estates of its decedents as it has done here where no actual conflict with the federal taxing power exists. Beneficial state legislation within the normal sphere of state action should not be stricken down on a claim based upon theoretical considerations. "Taxation is eminently practical." *Tyler* v. *United States*, 281 U. S. 497, 503.

We think that the absence of actual conflict is determinative of the issue in the present case, irrespective of the

wholly theoretical conflict upon which the majority of the New York Court of Appeals relied to sustain its decision.

POINT III.

There is not even a theoretical conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law. By its terms the Federal Estate Tax Law does not fix the final burden of the tax; it leaves this determination to the law of the State having jurisdiction over the estate.

Neither the majority of the New York Court of Appeals nor respondents have been able to point out an actual conflict between the operation and purposes of the two statutes here involved and none in fact exists.

What then is the conflict on which the Court of Appeals relied? The majority of that Court construed the Federal Estate Tax (by selecting one section from the entire law (Internal Revenue Code §826[b])) as placing the ultimate incidence of the tax upon the net *residuary* estate except where the testator directed to the contrary. It then determined that since Section 124 of the New York Decedent Estate Law provided that the amount of the tax after its payment should be prorated among all beneficiaries, again unless the testator directed to the contrary, the New York statute conflicted with the terms of the Federal Estate Tax Law where the testator was silent. On the basis of this conflict it held Section 124 to be unconstitutional.

It is an anomalous construction. It interprets the federal law as providing that an individual testator may determine the incidence as he sees fit, but a state, from whence the testator's privilege of making a will is derived, is power-

less to determine the incidence of the tax if the testator is silent on the subject.

The legislative history and background of the federal statute, its particular provisions and its interpretation by the courts neither compel nor permit any such construction. On the contrary the Federal Estate Tax Law expressly leaves the determination of the burden of the tax to the law of the state having jurisdiction over the estate.

The Legislative History and Background of the Federal Estate Tax Law.

In 1916 Congress faced with the necessity of increasing the revenue to meet expanding needs for preparedness, turned to death duties as an additional source of revenue.

At that time a political difficulty stood in the way of a federal death tax. That was the opposition of the states. Except for short periods, generally during wartime (a history and analysis of these statutes appears in *Knowlton v. Moore*, 178 U. S. 41) the states had been sole possessors of this source of revenue. By 1916 there were only five states in the Union which did not impose a death duty of some kind. (Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 57 (1933)).

Once it became known that Congress proposed to tap this source of revenue many state governments transmitted resolutions to Congress opposing the measure upon the grounds that it would be a serious encroachment upon a source of state revenues and would result in double taxation (53 Cong. Rec. 2803, 6625, 10537, app. 1404). Opposition to the bill on the same grounds was expressed on the floor of the House by numerous members (53 Cong. Rec. 10603, 10647, 10730, app. 1499, app. 1708). Indeed practi-

cally the entire discussion of the revenue bill so far as it dealt with the estate tax revolved around this question.

The particular type of tax which the Federal government proposed to enact obviously did not concern the states; they opposed any such tax. The type of Federal tax proposed was what is now familiarly known as an "estate" tax rather than an "inheritance" tax.

The reason for the selection by Congress of this type of tax resulted largely from the experience of the states with "inheritance" taxes. In 1916, 42 of the 43 states imposing death duties levied inheritance taxes. These acts imposed a tax on the right to receive property from a decedent. The tax was measured by the amount of the specific inheritance and in most states the tax rates increased with the size of the inheritance. All of the states recognized the principle of consanguinity, direct heirs being taxed at a lower rate than collateral relatives. (Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 57 (1933)). In order to determine the amount of the tax it was necessary to determine both the amount of the inheritance and the identity of the recipient. This made it necessary to resort to the terms of the will or statute of distribution. Where future interests were created under the will it was frequently necessary to resort to the courts to determine the nature of such interests and the identity of the persons entitled thereto (*e. g. Uterhart* v. *United States*, 240 U. S. 598). When such interests were contingent, either payment of the tax had to be postponed or a temporary deposit made to await the happening of the contingency.

By its nature a tax of this type rendered it necessary to consider the many complicated problems which might arise in connection with the construction of wills and trusts, the

application of probate laws, and the determination of the rights of the particular legatees.

> "These problems would be especially difficult in the case of the Federal Government, as the regulatory control over the passing of property at death is reserved to the States and there is a great divergence in the various State laws."

(Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. 2, Pt. 2, p. 103 (1933)).

That Congress in 1916 was aware of these difficulties is abundantly clear from the discussions on the floor and in committee. The existence of these difficulties in fact was the fundamental reason for proposing an estate tax, to be measured by the value of the estate without reference to the beneficiaries receiving the property, rather than an inheritance tax. (This distinction is described in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155.)

Representative Kitchin, Chairman of the Ways and Means Committee, in explaining to the House the nature of the estate tax prior to its enactment in 1916, made this clear (53 Cong. Rec. app. 1942):

> "We levy an entirely different system of inheritance tax. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."

The Ways and Means Committee of the House of Representatives then reported:

> "Your Committee deemed it advisable to recommend a federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> The federal estate tax recommended forms a well balanced system of inheritance taxation as between the federal government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares." (H. R. Rep. No. 922, 64th Congress, 1st Sess., C. B. 1939-1, Pt. 2, p. 25).

A member of the House in considering the federal bill and after pointing out that the proposed federal estate tax was imposed on the mass of the estate, inquired as to how the executor was to apportion the burden of the tax after it had been paid (53 Cong. Rec., app. 1495). Except for his inquiry there appears to be no other reference to it other than the statement of the Honorable Cordell Hull then a member of the House of Representatives that (53 Cong. Rec. 10657):

> "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision

in his will, the effect of which would more or less change the incidence of the tax."

Congressman Hull's reference in the above passage to "the same rule that would otherwise govern it" obviously referred to the rule of distribution imposed by state law. In effect he said this: In intestate estates the balance of the estate remaining after the tax has been paid shall be distributed pursuant to state law; in the estates of testators the balance of the estate remaining after payment of the tax shall be distributed in accordance with applicable state law or the testator can make special provision for the tax burden if he does not wish the general state law to be applied.

The conclusions to be drawn from the legislative history are:

(1) Since the burden of the tax after its payment had no bearing on the collection or amount of the tax, it played no part in the considerations of Congress.

(2) The burden was to be left to the determination of state law.

Section 826(b) of the Internal Revenue Code.

In arriving at their anomalous construction of the Federal Estate Tax Law, the majority of the Court of Appeals in this case relied entirely on this single section of the law (Section 826(b) of the Internal Revenue Code). This section has a far different meaning than the one the Court adopted.

The Revenue Act of 1916, as have all subsequent enactments, imposed a tax on the "net estate"[1] computed as provided by the act and required the executor to file the return and pay the tax (39 Stat. 779). That law as well as subsequent laws provided a remedy in the event the tax was not paid when due. In such event the government was authorized by Section 208 of the Act to subject the property of the decedent to sale and to apply the proceeds to the tax (39 Stat. 779). The tax was made a lien upon the entire estate of the decedent for ten years unless the tax was sooner paid (39 Stat. 780).

In providing for the sale of the decedent's property if the tax was not paid when due, Section 208 contained an additional sentence which was added without discussion by a Senate amendment to the House bill (H. R. Report No. 1200, 64th Cong., 1st Sess. 1916, C. B. 1939-1, Pt. 2, p. 39). This sentence has been continued in all subsequent revenue acts without change. It is now Section 826(b) of the Internal Revenue Code and reads as follows:

> "(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is sub-

[1] The "net estate" for tax purposes is a wholly artificial figure determined by subtracting statutory deductions and exemptions from a statutory "gross estate." The "net estate" for tax purposes has no relation to the true net estate distributable to beneficiaries under a will or to distributees in intestacy and of course it has no relation to the net residuary estate, distributable to the residuary legatees under a will.

> ject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The first part of this sentence presents no real problem. It says: If any beneficiary pays the tax, he shall be entitled to an equitable contribution from all other beneficiaries whose interests are subject to the burden of a portion of the tax as that burden is fixed by state law. (Obviously no legal distinction was intended to be drawn between "reimbursement" and "contribution".)

In providing for contribution between persons whose interest in the estate is "subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate"; there is a clear indication that state law was to control the burden of the tax. The burden of "debts, or other charges against the estate" is of necessity determined by state law and the inclusion of the word "taxes" implies that the burden of the federal tax is to be similarly fixed.

The second part of Section 826(b) provides:

> "• • • it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

These words seem merely to be carrying out the thought of the Honorable Cordell Hull noted above: (1) That in intestate estates the tax shall be paid by the administrator and the balance of the estate including the burden of the tax shall be distributed pursuant to state law; (2) that in testate

estates the tax shall be paid by the executor and that either the balance of the estate including the burden of the tax shall be distributed as provided by state law generally or specific direction may be given by the testator as to the burden of the tax.

This must be its meaning if the problem is looked at from the point of view of the actuality of estate administration.

Normally under state law specific legacies, demonstrative legacies and general legacies are paid in full, before anything is distributable to residuary legatees. Consequently under state law generally, debts administration expenses and other charges against the estate fall mathematically upon the residuary estate.

For this reason the majority of state courts, by treating the tax as any other charge against the estate, have held that the burden of the federal estate tax falls upon the residue by operation of applicable state law where the testator does not otherwise provide. *Amoskeag Trust Co.* v. *Dartmouth College,* 89 N. H. 471, 200 Atl. 786; *Plunkett* v. *Old Colony Trust Co.,* 223 Mass. 471, 124 N. E. 265; *People* v. *Northern Trust Co.,* 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge,* 198 Iowa 373, 199 N. W. 320; *Corbin* v. *Townshend,* 92 Conn. 501, 103 Atl. 647.

By the same token if there is no residue, then the tax would fall in accordance with the applicable state law relating to the order of abatement of general legacies, demonstrative legacies and specific legacies. Certainly there is nothing in Section 826(b) which says how the tax is to be borne if there is no residue.

Or if the residue consists partly of real property and partly of personal property, the burden of the tax would fall by operation of state law upon the personal property if such was the applicable local law relating to charges and

the will contained no provision to the contrary. *Hepburn v. Winthrop,* 83 F. (2d) 566 (App. D. C.).

Under the intestate law of many states the rules governing the descent of real property and the rules governing the distribution of personalty are different. It is also true under most state laws that debts and administration expenses are primarily chargeable against the personalty. Thus the normal result would be that under many state laws the federal estate tax would be charged pursuant to state law against the personalty. In *New York Trust Co.* v. *Eisner,* 256 U. S. 345 a suit by executors of a will attacking the constitutionality of the Federal Estate Tax Law it was erroneously conceived that this unequal imposition of the burden of the tax in intestate estates resulted from Section 826(b) of the Internal Revenue Code and that the federal law was, by reason of this inequity, unconstitutional. In answer to this argument and in effect saying that the final burden of the tax was a matter of state law Mr. Justice Holmes said (p. 349):

> "As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States."

Accordingly the phrase "it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution" as applied to testamentary estates, means no more than that the United States looks to the estate as a whole. But after the executor has paid the tax, the estate including the burden of the tax is left to be distributed pursuant to applicable state law and a testator may himself vary the ordinary rule of state law if he so desires.

Section 826(b) does not contain a command by Congress, as the New York Court of Appeals apprehended (without, however, offering an explanation for the phrase "so far as is practicable"), that the burden of the tax must fall on the *residuary* estate notwithstanding state law. (Indeed it does not mention the residuary estate at all.) It contains no command that state statutes affecting distribution must remain static or that a state cannot make such changes in its laws as it sees fit.

Section 826(c) of the Internal Revenue Code.

The Revenue Act of 1916 contained no provision for the inclusion in the taxable estate of life insurance of the decedent payable to named beneficiaries.

The 1918 Act added a provision making such insurance in excess of $40,000 includable in the gross estate. The Committee on Ways and Means stated that it had been brought to its attention that "wealthy persons have and now anticipate resorting to this method of defeating the estate tax" (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 102).

At the same time that Congress enacted this section, it included what is now Section 826(c) of the Internal Revenue Code without discussion and under the general statement that "minor changes in verbiage and slight modifications in procedure have been made for the sake of insuring more equitable, uniform and efficient administration of the law" (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 103).

Section 826(c) of the Internal Revenue Code provides:

> "(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent

receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

Since the legislative record is silent on the subject, it is permissible to hazard a guess as to the reason for the enactment of this provision. Life insurance payable to third persons, as the House Ways and Means Committee was clearly aware (H. R. Report No. 767, 65th Cong., 2d Sess. 1918, C. B. 1939-1, Pt. 2, p. 101), involved a contract between the named beneficiary and the insurance company. It was not, unlike transfers made in contemplation of or intended to take effect on death, traditionally treated as estate property. See *Washington Central Bank* v. *Hume*, 128 U. S. 195. This consideration as well as the apparent equities of the situation may have led Congress to enact this provision placing the weight of the resulting tax on insurance beneficiaries.

Courts have argued from this that the express apportionment of the burden with respect to insurance excluded any thought that Congress had directed the balance of the tax to be apportioned (*Bemis* v. *Converse*, 256 Mass. 131, 134, 140 N. E. 686, 687; see *Farmers' Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633). However this may be, we do say there is nothing in Section 826(c) to warrant the claim that Congress did not leave the determination of the ultimate burden of the balance of tax to be determined by local law.

Section 812(d) of the Internal Revenue Code and *Edwards* v. *Slocum*.

The construction of the Federal Estate Tax Law which we urge has been adopted and approved by the executive, the federal courts and Congress.

In 1924 when Congress amended the provisions of the Federal Estate Tax Law relating to the deduction of charitable bequests, it expressly recognized that the final incidence of its estate tax was a matter of state law. To understand the significance of this amendment, which is now Section 812(d) of the Internal Revenue Code, it is appropriate to review its history.

By an amendment in 1919 the Federal Estate Tax Law for the first time allowed the amount of charitable bequests to be deducted from the gross estate in computing the net taxable estate (40 Stat. 1098).

In *Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61, a question arose under this 1919 amendment between the Collector and the executors of the will of a New York decedent as to whether in computing the charitable deduction the amount of the residuary bequest to charity should be reduced by the amount of the federal estate tax. The executors contended that the amount of the charitable deduction was the value of the net residuary estate without subtraction of the amount of the federal estate tax. The Collector contended that the amount of the charitable deduction was the net residuary estate less the amount of the federal estate tax because under New York law the amount of the tax would be chargeable against the residuary legatees and the residuary legatees actually would only receive the net residuary estate reduced by the amount of the federal estate tax.

The Circuit Court of Appeals for the Second Circuit sustained the position of the executors on the ground that, the net estate for tax being an artificial figure used as a measure for determining the tax itself, to deduct the tax would require regarding the incidence of the tax in its computation; furthermore that it would be unjustifiable to impute to Congress an intent that such a special subtraction from charitable gifts be made since the incidence of the tax was a matter of state law which would vary from state to state. Judge Hough writing for a unanimous court, as to the incidence of the tax as a matter of local law, said:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case, *supra* * * *." (p. 653)

This opinion that state law governed the incidence of the tax was fundamental to the argument because in pointing out that it would be unreasonable to impute to Congress the intent to so reduce the charitable deduction, he said:

> "But all states do not treat the incidence of the tax as does New York; and if distributees were ratably assessed by the tribunal of administration to pay the estate tax, or if all estate taxes were treated as 'a charge against the estate,' the reasoning by which this tax is supported would fail. The result would be confusion, again something not to be imputed to the act if it can be avoided." (p. 654)

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[1] The judicial rule established in the *Hamlin* case was changed by Section 124 of the New York Decedent Estate Law.

Later in his opinion carrying out this same thought he said:

> "By its regulation of the incidence of the tax, New York does in fact diminish in favor of the United States what the charities receive; but it must be wrong for the executive departments of the United States to use the rule of incidence, which is of state creation to increase its own exactions * * *." (p. 655)

The next point of significance is that, when the Government appealed to this Court (by James M. Beck, Solicitor General, and Alfred A. Wheat, Special Assistant to the Attorney General) it, in Point I of its brief, adopted as its own the proposition of the Circuit Court of Appeals as a "fundamental and conceded proposition," as follows:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter."

It was upon this definite statement of the law, which counsel for the Government insisted was fundamental, that counsel proceeded to argue that under the terms of the Federal tax statute the amount of the deduction allowable in computing the tax should be determined by what the charities actually were to receive.

It was upon this fundamental law that the two New York commissions, working together, acted in writing Section 124 into their series of new tax laws. It is the identical proposition which because of the startling decision of the majority of the Court of Appeals we are now here seeking to restore and sustain.

This Court affirmed on February 18, 1924 (*Edwards* v. *Slocum*, 264 U. S. 61). In his opinion Mr. Justice Holmes, after stating that:

> "The executors prevailed in the District Court and Circuit Court of Appeals after a discussion with which the government well might have remained satisfied * * *" (p. 62),

pointed out that in its position the Government was:

> "* * * inconsistent with itself also in maintaining that while the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation, the residue is not to be diminished by the state inheritance tax but only by the estate tax of the United States." (p. 63)

In *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50, which was argued on the day following the *Slocum* case, Chief Justice Taft again indicated that the burden of the tax was a matter of state law. The tax there had been paid to the federal government, and the estate was closed so far as it was concerned. The question was between the beneficiaries as to where the burden of the tax should fall. The charitable residuary legatees contended that no part of the estate tax should fall upon their legacies, since Section 403 (3) of the Revenue Act of 1918 provided that the amount of charitable bequests should be deducted from the gross taxable estate in order to determine the net taxable estate. From this provision, the charitable residuary legatees argued that the manifest purpose of Congress was to exempt the beneficiaries under subdivision (3) from tax and the result of the construction by the Ohio courts was to place erroneously the entire burden of the tax upon the residuary estate. In answer to this argument Chief Justice Taft said at page 50:

> "There is nothing in subdivision (3) of §403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure

> the tax. It exempts the estate from a tax on what is thus deducted just as subdivision (4) exempts in terms the estate from taxation on its first $50,000; but this does not operate to exempt any legatee who may be entitled to the first $50,000 in the distribution, from deduction to contribute to the tax ultimately imposed, *if by the law of the State, such should be its incidence.*" (Italics supplied.)

The significance of these views thus unanimously expressed (though dismissed by the majority of the Court of Appeals in the present case as dicta) lies in the fact that when Congress enacted in 1924 what is now Section 812(d) of the Internal Revenue Code in order to change the result reached in the *Slocum* case, it adopted this "fundamental" and (by the Government) "conceded" proposition that the final burden of the weight of the tax is a matter of local law. The language of Section 812(d) is as follows:

> "If the tax imposed by section 810 [the federal estate tax] or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the laws of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes."

This enactment recognized in express terms that the burden of this tax or of any estate, succession, legacy or inheritance tax might be determined "by the terms of the will" or "by the law of the jurisdiction under which the estate is administered" or "by the law of the jurisdiction imposing the particular tax". Conforming with Judge Hough's proposition that the United States was not inter-

ested after it had collected its tax, Congress made no attempt here to direct by which one of these methods the burden of the federal estate tax was to be determined, and it is self-evident, we urge, that Congress intended that the burden of the tax could be determined "by the law of the jurisdiction under which the estate is administered".

Article 44 of U. S. Treasury Regulations 68 (1925), interpreting this amendment read in part:

> "* * * if a residuary estate, or a portion thereof, be bequeathed to charity, *and by local law* the Federal estate tax is payable out of the residuary estate, the deduction may not exceed that portion of the residuary estate bequeathed to charity as reduced by the Federal estate tax." (Italics supplied.)

This portion of the regulation is meaningless unless it is to be read in conformity with the Government's fundamental proposition that it is not concerned with the burden of the federal tax and that that is a matter of local law. (The same provision appears in Regulations 80, Article 44 (1937) and Regulations 105, Section 81.44 (1942).)

The Revenue Act of 1926 did not originally contain this amendment of the 1924 act, but in 1932 the 1926 act was amended so as to include it (47 Stat. 282).

In reporting on the revenue bill of 1932, the Senate Finance Committee, in explaining the proposed reenactment of the 1924 amendment, said in part (Sen. Rep. No. 665, 72d Cong., 1st Sess., C. B. 1939-1, Pt. 2, p. 534):

> "The Supreme Court on February 18, 1924, in the case of *Edwards* v. *Slocum* (264 U. S. 61), held that, as a matter of construction, a residuary gift to charity was not to be reduced by the Federal estate tax which was imposed on so much of the estate as the testatrix had bequeathed to individuals. Under

> the State law the estate tax was payable generally out of the estate and so fell upon and reduced the residuary estate given to charity. As a legislative reversal of the decision in that case, the sentence referred to was incorporated in the Revenue Act of 1924 and covered Federal estate taxes as well as State inheritance taxes where, *either by the terms of the will or by the local law,* any such tax operated to reduce the amount given to and received by charity." (Italics supplied.)

Where a testator makes a residuary bequest to charity, the way in which the burden of the tax falls may affect the amount of the tax. It is of significance that in the only situation in which it may make the slightest difference to Congress from the standpoint of revenue who bears the final burden of the tax, Congress has expressly permitted state law to determine the burden.

Section 812(d) has been continued in all revenue acts subsequent to 1932 and it was, of course, a part of the Federal Estate Tax Law applicable to the estate of this decedent.

Decisions Construing the Federal Estate Tax Law as to the Burden of the Federal Tax.

We know of no federal case which holds, or even declares by way of *dictum,* anything contrary to the succinct statement concurred in, as has been indicated above, by the Treasury Department, the Department of Justice, Congress and this Court, that:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees

and devisees cannot agree as to the burden bearing, the state courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case, *supra* * * *." (p. 653) (*Edwards* v. *Slocum*, 287 Fed. 651, 653)[1]

We have pointed out that the majority of state courts, by treating the tax as similar to debts and other charges against the estate, have applied the usual state rule and charged the tax against the residue (see p. 36 above). Some have done so with the express recognition that the incidence was a matter of local law. *Amoskeag Trust Co.* v. *Dartmouth College*, 89 N. H. 471, 200 Atl. 786; *Gaede* v. *Carroll*, 114 N. J. Eq. 524, 169 Atl. 172; *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Thompson* v. *Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S. W. 324; see *Hepburn* v. *Winthrop*, 83 F. (2d) 566 (App. D. C.).

The cases in New York decided prior to the enactment of Section 124 of the Decedent Estate Law in 1930 in charging the burden of the tax against the residue reached the same result as most of the other state decisions. *Matter of Hamlin*, 226 N. Y. 407, 124 N. E. 4, cert. denied 250 U. S. 672 (decedent died in 1917); *Farmers Loan & Trust Co.* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, cert. denied 266 U. S. 633 (decedent died in 1918); *Matter of Oakes*, 248 N. Y. 280, 162 N. E. 79 (decedent died in 1919, rec. on app. fol. 313). In so far as they purported to rely on an interpretation of the Federal Estate Tax Law which "commanded" that the burden of the tax should fall on the residuary estate, they appear to have been decided on reasoning unnecessary for the decision. In those cases the Federal Estate Tax Law applicable to the estates therein before the court did not

[1] As we have pointed out the judge made rule of the *Hamlin* case was changed by the legislature by the enactment of Section 124 of the Decedent Estate Law.

contain the subsequent amendment which is now Section 812(d) of the Internal Revenue Code; in each case the decedent had died several years prior to 1924.

The Pertinent Rules of Construction Support the Interpretation of the Federal Estate Tax Law Here Presented.

The construction here presented gives effect to the fundamental purpose of Congress in enacting an estate tax rather than an inheritance tax—that of avoiding conflict with the states. (See *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464).

To give the act a contrary construction—and thus to negative the right of the state to regulate the balance of the estate remaining after the tax is paid—would impute to Congress a purely arbitrary design to interfere with the state's right to regulate inheritances and its estates and cast doubt upon the constitutionality of its own act (see Point I above). Such a construction is to be avoided. (*Palmer* v. *Massachusetts*, 308 U. S. 79, 84.)

The construction which we propose is in accordance with the rule which favors the constitutionality of state acts. (*Corporation Commission* v. *Lowe*, 281 U. S. 431, 438.)

It avoids an absurd, harsh and unnecessary construction. (*Haggar Co.* v. *Helvering*, 308 U. S. 389, 394; *Burnet* v. *Guggenheim*, 288 U. S. 280, 285; *Heydenfeldt* v. *Daney Gold & Silver Min. Co.*, 93 U. S. 634, 638.)

It is absurd, we urge, to construe a federal law for the collection of a tax as placing the incidence of the tax upon the residuary estate where the federal government cannot have the slightest concern as to whether the testator's residuary beneficiaries, as contrasted with his specific pecuni-

ary beneficiaries, shall bear the entire burden of the tax if the will happens to be silent. There are many instances where there is no residuary estate and it raises the question as to what, in any given instance, may be a *residuary* estate, the very kind of question sought to be avoided by Congress.

It would be a harsh construction because, contrary to the declared policy of the state of New York, it places the final burden entirely upon those whom the state legislature after full investigation by two state commissions, believes the testator, if silent on the subject, would naturally intend to be the protected objects of his bounty.

It is an unnecessary construction because it is in no way relevant to the purpose of the act and does not affect the amount or collection of the federal tax.

By its terms, the apportionment provided by the state law does not become effective until the tax has been paid and so far as the federal government is concerned the estate has been closed.

A Construction to Permit State Law to Govern the Final Incidence Would not Render the Act Violative of the Uniformity Clause of the Federal Constitution.

To permit the state law to govern the final incidence of the tax, does not give to the Federal Estate Tax Law a construction which would render it invalid under the constitutional requirement of geographic uniformity (U. S. Const. Art. I, Sec. 8). In *Phillips* v. *Commissioner*, 283 U. S. 589, where the constitutionality of the transferee liability provisions of a Federal Income Tax Law[1] were chal-

[1] The Federal Estate Tax Law contains a provision similar to the section of the Income Tax Law considered in the Phillips case (Internal Revenue Code, Sec. 900).

lenged for lack of uniformity on the ground that the incidence of the tax thereby imposed was left to local law, Mr. Justice Brandeis stated (p. 602):

> "The extent and incidence of Federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. Florida *v.* Mellon, 273 U. S. 12, 17; Crooks *v.* Harrelson, 282 U. S. 55; Poe *v.* Seaborn, 282 U. S. 101, 117."

Because the Federal Estate Tax Law provides that the gross estate of the decedent shall be determined by including the value of all property to the extent of the interest of the decedent at the time of his death, the amount of the tax may frequently be affected by state law by necessary implication, (*e. g.*, state law as to community property). There are at least three provisions in the Federal Estate Tax Law under which the amount of the federal estate tax is affected by state law by express direction of Congress. Debts administration expenses and certain other items "as allowed by the laws of the jurisdiction . . . under which the estate is administered" are deductible from the gross taxable estate (Internal Revenue Code, Sec. 812 (b)). The amount of the charitable deduction from the gross taxable estate may depend upon the burden of the federal tax "as determined by the laws of the jurisdiction under which the estate is administered" (Internal Revenue Code, Sec. 812 (d)). A credit against the federal tax is allowed for the amount of any estate, inheritance, legacy, or succession taxes actually paid to any state (Internal Revenue Code, Sec. 813).

POINT IV.

Section 124 of the New York Decedent Estate Law is valid as applied to Josephine del Drago's estate because it does no more than impose a condition on her privilege of making a will. Congress by necessary implication left this control of the will making privilege to the states by expressly permitting a will maker to determine the final burden of the tax.

In this final point we assume solely for the purposes of argument that the New York Court of Appeals properly construed the Federal Estate Tax Law. Under its construction it would follow that Section 826(b) of the Internal Revenue Code must be assumed to mean that "it is the intent of Congress that unless otherwise directed by the will of the decedent, the burden of the tax shall be borne by the residuary beneficiaries."

Whatever meaning is placed upon Section 826(b), both that Section and Section 812(d) specifically leave the determination of the burden of the tax to the testator's will.

Thus before the burden of the tax in Mrs. del Drago's estate can be determined it is necessary that the meaning and effect of her will be ascertained.

Under well settled principles, since Mrs. del Drago died domiciled in New York, the meaning and effect of her will are to be determined under the law of the State of New York. *Uterhart* v. *United States*, 240 U. S. 598; 2 Beale, Conflict of Laws. (1935) 1034, 1036, 1038.

The testamentary instrument itself is silent, but under the New York law of wills her silence in this instance, as in many other instances[1] has meaning. Section 124 of the New

[1] E.g. a power of appointment is deemed to be exercised where the will is silent (Sec. 18 N. Y. Personal Property Law). And see Sections 13, 26, 38, 41, 47a, 47b, 47c of N. Y. Decedent Estate Law.

York Decedent Estate Law provides in effect that unless Mrs. del Drago said affirmatively to the contrary, her will is to be construed as providing that the tax shall be equitably borne by all persons sharing in the estate. As we have shown in Point I, New York has the power to impose a condition upon or even abolish the testamentary privilege.

> "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (*Irving Trust Co.* v. *Day*, 314 U. S. 556, 562)

Consequently, construed as it must be under the law of New York Mrs. del Drago's will provided for the apportionment of taxes just as much as if such a clause had been physically embodied in her will. *Irving Trust Co.* v. *Day*, 314 U. S. 556, 563; *Matter of Bergdorf*, 206 N. Y. 309, 316, 99 N. E. 714, 717.

Since this is merely what Congress specifically authorized to be done, no conflict can possibly exist between the Federal Estate Tax Law and Section 124 of the New York Decedent Estate Law.

Once respondents concede, as indeed they must, that a testator is authorized by Congress to provide in his will for the burden of the tax, they have destroyed any conceivable basis upon which conflict might be claimed.

Conclusion.

The order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York entered on the remittitur of the Court of Appeals should be reversed.

Dated: September 10, 1942.

Respectfully submitted,

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Appendix.

The Statutes Involved.

Section 124 of the New York Decedent Estate Law (Laws of 1930, c. 709):

"§124. Apportionment of federal and state estate taxes; executor or administrator to deduct taxes from distributive shares.

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will,[1] shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions

[1] The only amendment to Section 124 since its enactment in 1930 has been the addition in 1940 of a second exception clause, "and except in a case where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument." Laws of 1940, c. 829, §13.

allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estate. For the purposes of this section the term 'persons interested in the estate' shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty."

Section 812(d) of the Internal Revenue Code (26 U. S. C. §812 (d)) (derived from Section 303 (a) (3) of Title III of the Revenue Act of 1926, as amended in 1932 (47 Stat. 282), without change).

Section 812 provides that for the purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate:

"(d) *Transfers for public, charitable, and religious uses.* The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the

deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate. (53 stat. 123.)"

Section 826 of the Internal Revenue Code (26 U. S. C. §826) (derived from Section 314 of Title III of the Revenue Act of 1926 (44 Stat. 79) without change):

"§826. *Collection of unpaid tax*—(a) *Sale of property.* If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the

estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of life insurance beneficiaries.* If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. (53 Stat. 127.)"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~680~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

BRIEF FOR RESPONDENT BYRON CLARK, JR., AS EXECUTOR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

JOSEPH C. THOMSON,
LITTLETON FOX,
ANTHONY J. CAPUTO,
Counsel for Respondent,
Byron Clark, Jr., as Executor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

LAWRASON RIGGS, JR., Special Guardian, Petitioner, *against* GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee, Respondents.	No. 980

BRIEF FOR RESPONDENT BYRON CLARK, JR., AS EXECUTOR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

Statement

Lawrason Riggs, Jr., the Special Guardian for certain infant children of the remainderman of the residuary trust created under the will of Josephine del Drago, deceased, has petitioned this Court for a Writ of Certiorari to review a decision of the Court of Appeals of New York State, reversing the determination of the Surrogate of New York County which required an apportionment of the Federal Estate Tax among the persons beneficially interested in the estate. There being no provision to the contrary in the will, the Surrogate made the decree pursuant to Section 124 of the Decedent Estate Law of New York State.

Byron Clark, Jr., the Executor-Respondent herein, has maintained from the inception of this litigation that the determination of the New York Surrogate upholding the constitutionality of Section 124 was correct and now urges the issuance of a Writ of Certiorari so that this matter may be reviewed.

QUESTION PRESENTED

Are Sections 124 of the Decedent Estate Law or 249-t of Article 10-c of the New York State Tax Law in so far as they authorize, require or direct distribution and apportionment of the Federal Estate Tax levied upon the estate of the deceased among the legatees, repugnant to the provisions of the Federal Estate Tax Act of 1926 and amendments thereto and to the uniformity and supremacy clauses of the Federal Constitution and therefore unconstitutional.

ARGUMENT

POINT I

There can be no doubt that the decision of the Court of Appeals of New York State, if permitted to stand, will destroy the right of that state to fix the incidence of the tax imposed by the Federal Estate Tax Law. This right had hitherto been exercised by the State of New York as well as the Commonwealth of Pennsylvania which has a similar statute. As a result of the decision in this case, the statute in Pennsylvania has also been challenged in the courts of that State. The change and uncertainty created by this decision are matters of great concern to attorneys representing taxable estates. A flood of inquiries made to the office of your respondent since the decision herein was rendered attests to the chaos created thereby. In many instances the final disposition of assets has been prevented.

The grounds of unconstitutionality set forth by the majority of the New York court are strained. In this respect, Judge Hough's comment in *Edwards* v. *Slocum*, 287 Fed. 651, affirmed 264 U. S. 61, printed at page 9 of the Petition of the Special Guardian, cannot be repeated too often since it represents the realistic and substantial

approach to the question this Court is asked to review. Although it is the path leading out of the maze of constitutional objections raised by the respondent legatees, the wisdom of the learned Judge's statement was ignored by the majority of the State Court because it constituted pure dicta. (*Matter of del Drago*, 287 N. Y. 61 at 78.) The minority judges took a more practical view when Judge Desmond in the dissenting opinion said at page 82:

> "We need not take time for a careful inquiry as to whether or not these expressions in the federal decisions are dicta. Dicta or not, binding on us or not, they cannot be ignored, particularly when they have been so long regarded as stating the law, and when they agree with the expressed views of the members of Congress and with the logic of the situation. Why should Congress concern itself as to the ultimate resting place of the tax?"

The control of decedents' estates is exclusively a matter for the several states. The recent decision of this court in *Irving Trust Co.* v. *Day*, 62 Sup. Ct. Rep. 398, Advance Sheets of January 13, 1942, decided January 5, 1942, has reaffirmed this right. It seems without question that such control was properly exercised by the State of New York when it declared through Section 124 of its Decedent Estate Law that in the absence of a contrary provision in the will, it would apportion the burden of the federal estate tax among the legatees.

Eight judges have passed on the question in this case. The four constituting the majority of the Court of Appeals held the statute unconstitutional. The other four, namely the three other Judges of the Court of Appeals, including the learned Chief Justice, and the learned Surrogate of New York County, held it to be constitutional. With such diversity of opinion particularly as shown by the lengthy opinions in the highest state court, it is peculiarly proper that this Court should consider the question now upon its initial presentation, rather than await a presentation of this same question in a matter coming to this Court as of right.

CONCLUSION

The respondent Byron Clark, Jr. respectfully requests that this matter be reviewed by this Court and joins in the prayer of the special guardian that a writ of certiorari be issued.

Respectfully submitted,

JOSEPH C. THOMSON,
LITTLETON FOX,
ANTHONY J. CAPUTO,
Counsel for Respondent,
Byron Clark, Jr., as Executor.

Dated: New York, March 14th, 1942.

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IN THE

Supreme Court of the United States

October Term, 1941—No. ~~000~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,

Respondents.

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY COHEN,
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Hallsby Press Inc.—New York City

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IN THE

Supreme Court of the United States

October Term, 1941—No. 980

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—*against*—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee,

Respondents.

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement.

When Congress in 1916 imposed a federal death duty, it selected the estate tax, which falls upon the estate as such without recourse to the beneficiaries. And as the result of debate upon the bill as originally proposed, Congress included in the law what is now section 826-b of the Internal Revenue Code, in which Congress directed how the tax shall fall. It has since rejected proposals that it alter the nature of the tax so as to apportion the burden among the beneficiaries, and it has authorized apportionment of the tax as to insurance monies only. The reasons why Congress had and maintains this intention are matters of record (p.

9 *et seq.*). Since New York Decedent Estate law section 124 seeks to change the incidence of the tax and to apportion it among the beneficiaries, the court below has found section 124, together with the allied section 249-t of the New York Tax Law, unconstitutional. 287 N. Y. 61 (R. 91-104).

Questions Involved.

The underlying legal issue is the asserted violation of the Supremacy Clause of the Federal Constitution (Art. VI, cl. 2). Its determination requires only the application of settled principles. The only question upon which this Court has not directly passed is as to the meaning of section 826-b in the light of its extended legislative history—a meaning correctly found in the court below (R. 95-6).

A subsidiary question arises but only upon the assumption that section 826-b does not fix the incidence of the tax. Upon this question the court below ruled that only the express assent of Congress would enable New York to disturb the uniform incidence of the federal tax which, it is accepted, falls even without the express command of section 826-b upon the estate as such and not upon the beneficiaries (R. 100-101).

Petitioner's assertion that the decision carries serious consequences to "carefully made plans" of many persons (Petition, p. 8), should be measured in the light of the fact that section 826-b (as well as section 124 of the New York Decedent Estate Law) authorizes the testator to fix the incidence of the tax. It is quite unusual that a Will disposing of substantial assets does not explicitly fix the incidence of all taxes. The least experienced of draftsmen today writes a tax clause in a Will as quickly as he provides for payment of debts and funeral expenses; only the draftsman's blunder (as we believe occurred in the present case) affords occasion for application of section 124.

Responsible opinion has differed as to whether the incidence of the federal tax, admittedly upon the residue of the estate and not upon the legacies, is fair. But only the petition charges (p. 12) that the decision of the Court of Appeals reaches "absurd" results. The opinion of the New York State Decedent Estate Commission which recommended section 124 as part of New York's new estate tax in 1930 is at variance with the views of the draftsman of the federal estate tax law, Mr. Cordell Hull (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657 *infra* p. 11 *et seq.*), and at variance with views twice expressed in this Court (see *Knowlton* v. *Moore*, 178 U. S. 41 at p. 77 and 109; *Stebbins* v. *Riley*, 268 U. S. 137 at 145, per Stone, *J.*). It would seem that no single rule will do justice in all circumstances; this Court will not, if it accepts jurisdiction of this case, solve that problem.

The dictum in *Edwards* v. *Slocum*, 287 Fed. 651 (at p. 653), *per* Judge Hough, as well as the related observations upon which the petition relies so heavily (p. 9), are as plausible as they are casual, but they are in error as to the fact of Congressional intention. The considerable mass of proof that Congress was in fact concerned that the estate as such and not the beneficiaries should bear the weight of its tax was not called to Judge Hough's attention. The whole question was irrelevant to the decision of his case and was not argued by counsel.

Petitioner recognizes in Point II of the brief the issue in this case: whether in the face of the Congressional declaration in section 826-b of its purpose to fix the incidence of the tax upon the estate, New York is nevertheless competent to direct that the tax be apportioned among the legatees. The Court of Appeals did not err in deciding that the reserved power of the State over distribution of the estates of its decedents does not justify such overriding of the expressed Congressional purpose—any more, for example, than a State purporting to regulate local conditions of employ-

ment would be competent to change the incidence of the federal payroll tax.

Two proposals are before the present Congress, either of which would render academic the issue in this case.

The first proposal has wide scope. It proposes that Congress write into the federal law its own scheme for apportionment of the tax. It cannot but emphasize that the incidence of the tax is a matter for Federal regulation with which the States cannot interfere. It was advanced on behalf of the Treasury Department by Mr. Randolph Paul, Tax Adviser to the Secretary of the Treasury, in his recent statement before the House Ways and Means Committee, March 3 (Wall Street Journal, March 5, 1942, page 16, column 4) and we are informed it is now under consideration in the House Committee. Mr. Paul stated:

> "*Federal Apportionment Statute.* At the present time there is no provision apportioning the estate tax liability among the beneficiaries of the estate other than a provision relating to life insurance. There is no sound basis for having an express provision apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax. It is therefore suggested that there be incorporated in the estate tax an apportionment provision which would apportion the liability for tax in those cases in which the decedent did not himself prescribe a method of apportionment."

The other measure proposes to amend section 826-b so that it expressly authorize the States to apportion the Federal estate tax (H. R. 6257, by Representative Keogh). If either of these amendments is indeed appropriate, then Congress and not the Courts—much less the States—should dictate it (R. 103, fol. 102).

POINT I.

Congress expressed in section 826-b of the Internal Revenue Code its intention to impose its tax upon the estate and not upon any legacy.

The petitioner does not face section 826-b, although its meaning is fully expounded and reliance principally placed upon it in the opinion of Judge Rippey in the court below (R. 95-6). The section states the intent of Congress that its tax should not be a legacy or inheritance tax, but should be an estate tax with its incidence upon the estate and not upon the beneficiaries.*

Section 826-b was first proposed as an amendment in the Senate (53 Cong. Rec. 64th Cong. 1st Sess. p. 13299), doubtless as a result of the discussion in Congress as to the incidence of the tax (p. 8 *et seq., infra*). The provision immediately preceding (sec. 826-a) authorizes the collection of the tax from any property of the decedent wherever found, and section 826-b is redundant unless its purpose is to fix where the burden of the tax shall ultimately fall.

Section 826-b of the Internal Revenue Code.

Sec. 826-b. *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced

* The opinion below does not, as the petition states (p. 5), construe the section to mean that Congress had a specific intention that the tax should fall upon the *residue* of the estate. The point is rather that Congress did not want the tax to be a tax on the beneficiaries; therefore it must naturally fall on the residue.

had the tax been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, *it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.*"

First: The concluding declaration of the Congressional intent that (unless the testator otherwise direct) the tax be paid "out of the estate before its distribution" would seem unmistakable. It is not merely a regulation of the *time* when the tax must be paid. An earlier section of the law fixes the time when the tax must be paid (Internal Revenue Code, sec. 822). That section also directs that the executor pay the tax, and of course he will not do so *after* distribution.*

The purpose of this provision is rather to declare that the tax is not to be upon the beneficiaries. Thus, the testator is permitted to direct "otherwise." This cannot mean that the testator is authorized to direct that payment of the tax be postponed until after distribution of the estate. It means that he may direct that the incidence of the tax should not rest upon the estate (*i.e.* "paid out of the estate before distribution") but should be apportioned among the beneficiaries.

Second: The opening portion of the section seems equally conclusive. By regulating the questions of reimbursement and contribution, it ensures that the beneficiaries shall not bear any part of the tax. Any beneficiary is given reimbursement from the estate if he has been required to pay any part of the tax.

This direction, it should be noted, is for "reimbursement" and not merely contribution—the text of the section itself

---

* The statutes are collected in the Appendix.

shows that its draftsman appreciated the distinction. And it commands reimbursement of any beneficiary if he pay "any part" of the tax—which may of course be less than what might be deemed his *pro rata* contribution of the tax.

Even if, as petitioner argues (p. 11), it were true that this State apportionment law is unconstitutional only if it "cannot be reconciled or consistently stand together" with the federal law, such repugnancy is apparent at this point. Decedent Estate Law section 124 commands that the executor paying any portion of the tax have contribution from the beneficiaries—a direct reversal of section 826-b. Would anyone maintain that if the collector had levied upon the trust for Marcel del Drago (R. 76-7) and had collected all of the tax from that source, then the rights of the trustee of that trust would be limited to contribution under Decedent Estate Law section 124 instead of full reimbursement under section 826-b?

Third: The succeeding portion of section 826-b speaks of contribution among beneficiaries. But it seems to presuppose that the tax shall nevertheless fall like "other charges against the estate," and it is addressed to less usual situations: where the estate has been distributed without payment of the tax, or where there has been no will; and, of course, where the testator has directed apportionment of the tax among the beneficiaries.

The courts which have considered the meaning of section 826-b have held that it shows the Congressional intent to place the tax upon the estate and not the beneficiaries and have refused to direct apportionment of the tax on that ground (*Matter of Oakes*, 248 N. Y. 280 at 282; *Matter of Hamlin*, 226 N. Y. 407 at p. 418; *Farmers' L. & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 495; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 367 *et seq.*; *People* v. *Pasfield*, 284 Ill. 450 at 453-4).

The ruling of Mr. Justice Cardozo in *Matter of Oakes, supra*, denying a claim for apportionment of the tax, should serve to dispose of contrary assumptions found in certain opinions upon which the petition relies (Petition, p. 8):

> "* * * The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole, and, primarily at least,* is a charge upon the residue. (Matter of Hamlin, 226 N. Y. 407.) * * *
>
> *"The command of the statute is explicit as to the incidence of the burden.* 'If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, * * * it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.' (40 Stat. 1096, 1100, c. 18, Sec. 408, Revenue Act of Feb. 24, 1919; *Farmers Loan & Trust Co.* v. *Winthrop, supra*, p. 497). *The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been modified by the will* * * *"* (at p. 282, emphasis added).

It seems more than coincidence that this declaration of section 826-b, written in the Senate, is in the language of Mr. Hull, used shortly before in describing the incidence of the tax (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657).

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* i.e., in the absence of direction in the will and not, as suggested in the dissenting opinion below (R. 107), in the absence of State regulation.

Where an intestacy, Mr. Hull observed, "the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern * *.*." And:

> "Where the decedent makes a will he can allow the estate tax to fasten on the net estate in the same manner, or if he objects to this *equitable* method of imposing it upon the *entire net estate before distribution* he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax."

Prior to the formulation in the Senate of section 826-b, question had been raised whether the bill as drawn did not permit of apportionment of the tax.*

The Reasons Motivating Congress.

We turn to the argument in the petition and the dissenting opinion below that notwithstanding section 826-b, Congress could not have had any interest in the incidence of its

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* E.g., the remarks of Rep. Dillon (53 Cong. Rec. 64th Cong. 1st Sess. Appendix at pp. 1495-6):

"If he (the executor) pays the tax no provision is made for a charge against the beneficiaries. How is he to settle the rights between numerous beneficiaries where the tax is increased in proportion to the value of the estate? If it be argued that the administrator or executor would be required to pay the tax in the first instance and then collect it from the heirs or legatees then it becomes pertinent to know in what ratio he is to assess the heirs and legatees.

* * * * *

"It seems to me that the framers of this bill have overlooked all the congressional acts heretofore passed imposing a tax upon the right of succession to property and have overlooked the fact that the tax must rest against the legatee or heir who received the distributive share of the estate. The tax not being levied on the succession to property of the decedent but on the property itself becomes a direct tax *etc.* * * *"

estate tax (R. 106; petition, p. 9). The fact is that Congress did in 1916 have such an interest, and from several aspects.

Constitutional considerations. In the elaborate opinion of Chief Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, the rule was laid down—and applied—that a tax upon a legacy measured by the size of the estate rather than by the size of the legacy, would cause such "profound inequality" as not merely to offend the Constitution, but also to "transcend the limitations arising from those fundamental concepts of free government which underly all constitutional systems" (178 U. S. at p. 77; see also p. 109; cf. *Matter of Sherman*, 179 App. Div. 497). This, in 1916 still the governing judicial pronouncement, alone explains why in that year there should have been written this explicit direction that the tax should fall on the estate rather than be apportioned among the legatees.*

Adjustment with the States. There was also the problem of reconciling any federal tax with existing State death taxes. When the proposal for a federal estate tax was made in 1916 it met with intense opposition in behalf of the States that such taxes were the prerogative of the States and that on many grounds, practical as well as theoretical, the federal government should not invade that province.** Since the

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* The constitutionality of the estate tax was indeed sustained, as against the challenge so foreshadowed in *Knowlton* v. *Moore*, upon the ground that the tax, being an estate tax, did not fall upon any of the legatees (see the opinion of Judge Mack in *New York Trust Co.* v. *Eisner*, 263 Fed. 620 at 621; aff'd 256 U. S. 345).

** See 53 Cong. Rec. 64th Cong. 1st Sess. at pp. 10659, 10730, 10731, 10752, 10761, 13043, 13044, 13060, 13098, 13130, 13188, 13191, 13192, 13297; Appendix at pp. 1403-5, 1406, 1408, 1499, 1708, 1709.

The National Tax Association had by formal resolutions since 1907 opposed a federal estate tax on this ground (Proc. Nat. Tax Cong. 1907 at p. 662; 1908 at p. 25; 1912 at pp. 176-9, 195-7).

death taxes levied by the States—42 of them—in 1916 were legacy and not estate taxes, the solution was thought to lie in a federal death tax which would be confined to the estate and which would not fall upon the legatees. The draftsmen and proponents of the federal tax said and indicated repeatedly that they considered the estate tax to be a supplement to the State legacy taxes and not a competitor.

It must be remembered that the legacy taxes imposed by the States, considered solely as a practical matter, were quite different from the estate tax. Put aside the question of the incidence of their burden—the States graduated their rates, as well as exemptions from the gross taxable amount, by the size of the individual legacy and by the relationship of the legatee to the decedent. Because of these limitations, the State taxes yielded little revenue (53 Cong. Rec. 64th Cong. 1st Sess. at p. 13103), and there was room for the view that an estate tax, since it would not take any such account of relationships but would fall on the estate alone without recourse to the beneficiaries, would not be objectionable as in conflict with the State death duties. As Mr. Hull stated when asked, perhaps facetiously, whether his bill sought to relieve taxpayers: "I was undertaking to say that it was proposed to supplement existing tax laws, in the light of their operation and effects on all the people, by

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Leading economists were also opposed—for example, Prof. C. J. Bullock: "For the federal government to enter this field would be worse than a blunder, it would be a fiscal crime" (The Position of the Inheritance Tax in American Taxation, 1 Proc. Nat. Tax. Assn., p. 240).

Some of the States also adopted resolutions in opposition, i.e. Rhode Island, Laws 1916 at p. 382; and compare the resolutions of the tax boards of California and Wisconsin at 53 Cong. Rec. 64th Cong. 1st Sess. at p. 1404 *et seq.*

this provision." (53 Cong. Rec., 64th Cong. 1st Sess. at p. 10655).*

Mr. Hull made another and more explicit statement to the same effect. He asserted that there was no conflict with any State system. He stated his underlying conception that the estate tax "should be combined with a well balanced system of share taxes when viewed as a permanent tax measure" (53 Cong. Rec. 64th Cong. 1st Sess. at p. 10657) and he applied it so:

> "The effect of the rates carried in the pending estate tax bill when considered as a supplement to our State taxes on shares of estates will not be unjust or unreasonable; on the contrary, the State laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. *The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation*" (p. 10657).

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* The statement of Rep. Kitchen, Chairman of the House Committee, illuminates this understanding (compare the position taken in the dissenting opinion below that his words show indifference to the incidence of the tax—R. 105) (53 Cong. Rec. 64th Cong. 1st Sess. Appendix p. 1942):

> "Mr. Cox. Does the gentleman recall how his tax rates compare with the inheritance tax rates in the State of New York?
>
> Mr. Kitchen. No; I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."

Mr. Hull reiterated these views in 1918 (56 Cong. Rec. 65th Cong. 2nd Sess. at p. 10167; *cf.* his statement in 1927, 69 Cong. Rec. 70th Cong. 1st Sess. at p. 635; see, also, Proceedings of National Conference on Inheritance and Estate Taxation, Feb. 1925, p. 105).

The Committee in charge of the bill made the same point (House Rep. No. 922, Committee on Ways and Means, 64th Cong., 1st Sess., p. 5):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax *upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.*
>
> "'The Federal estate tax recommended forms a *well-balanced system* of inheritance taxation as between the Federal Government and the various States * * * '".

(See also the extended remarks of Rep. Kitchin at Cong. Rec., id., p. 10596.)*

This conception of the federal estate tax as complementary to the State legacy taxes rests on sound economic theory (E. R. A. Seligman, Address at Nat. Conf. on Inheritance and Estate Taxation on Feb. 10, 1925—Report of Proceed-

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* The structure of the bill as originally proposed (without section 826-b) confirms the thought. Every previous federal death tax had made specific provision for payment of the tax by the legatees and not by the estate (30 Stat. 448, 464-6 (June 1898) as amended 31 Stat. 946 (1901); 13 Stat. 223, 285-7, 287-91 (July 1864); 12 Stat. 432, 485-6 (July 1862); 1 Stat. 527 (July 1797)). Similarly the English estate tax laws, which furnished the model for the original draft of this bill for a federal estate tax, apportioned the tax (Finance Act, 57 & 58 Vict., c. 30 Secs. 9(4) and 14(1)). But all such provisions were omitted from the draft of the federal tax in 1916—because it was desired that the tax should not be apportioned.

ings, pp. 59-60). And this conception *requires* that the estate tax fall on the estate without recourse to the beneficiaries. Such is the purpose of section 826-b.

It is not an answer, that these reasons underlying section 826-b may not survive today. The section itself is a part of existing law, and "It is quite inadmissible to assume that Congress exerting federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions as to State power which were not rendered until several years later" (*Burnet* v. *Brooks*, 288 U. S. 378 at 389). The statute must of course be interpreted "in the light of the circumstances as they existed when the statute was passed" (*Louisville & Nevada R. R. Co.* v. *Mottley*, 219 U. S. 467 at 474).

Subsequent History.

There has been continuous pressure in Congress which would alter the incidence of the estate tax. In 1918-19 there was an unsuccessful attempt to substitute a new death tax under which the tax would specifically fall on the legacies (65th Congress, 3rd Session, H. R. Rept. No. 1037, pp. 70 *et seq.*) Contemporary evidence is that one of the purposes was to remove the incidence of the estate tax from the residue.*

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* The Survey, November 23, 1918—"Mrs. Sage's Will and the Federal Estate tax", by Robert W. DeForest. The author, after referring to the fact that the charities who were residuary legatees under Mrs. Sage's will bore the entire tax on her large estate (*cf. Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61), stated:

> "Undoubtedly it is this consideration which has led the Finance Committee of the Senate to propose an amendment to the tax bill already adopted by the House whereby the Federal estate tax shall hereafter be imposed on individual legacies and not on the estate as such, and it is earnestly to be hoped that if any estate tax remains in the present revenue bill it shall be imposed in this way."

One change was, however, effected in 1918. Section 826(c) of the Internal Revenue Code was added to the law. It directs that the tax attributable to the proceeds of insurance policies be apportioned among the beneficiaries of the insurance (40 Stat. 1097, 1100; see H. R. No. 767, 65th Congress, 2nd Session, page 22 *et seq.*). It directs an order of reimbursement directly contrary to that directed in Section 826(b)—it provides that the executor shall have reimbursement from the beneficiary. In this respect it is identical with Decedent Estate Law section 124. But there is the vital difference that it was Congress—and not New York— which saw fit to alter the incidence of its tax, and moreover only to this limited extent. As Chief Justice Rugg said in *Bemis* v. *Converse*, 246 Mass. 131, at 134:

> "The presence of this provision indicates that no further apportionment was intended by Congress."

In 1921 renewed suggestions for the substitution of a legacy tax for the Federal estate tax were considered and rejected (61 Cong. Rec. 67th Cong. 1st Sess. at pp. 6922, 5839-40).

Again in 1924 an effort to substitute a legacy tax was made (65 Cong. Rec. 68th Cong. 1st Sess. at pp. 8034 *et seq.*, 8037). Specific provision was proposed, as in Decedent Estate Law section 124, for reimbursement of the executor by the legatees (proposed section 310(a)). One of the stated reasons* for this proposal was that the incidence of the existing estate tax, upon the residue, was considered objection-

* Senator Walsh of Massachusetts, 65 Cong. Rec., 68th Cong. 1st Sess. at page 8039:

"The estate tax is not a fair tax. Being imposed on the total amount of the estate, it ordinarily is paid out of the residuary estate, not out of any particular legacy. The residuary legatee rather than the estate is the real taxpayer. All other beneficiaries ordinarily escape. This frequently works great hardship, and usually is contrary to the decedent's wish. The residue is frequently the bulk of the estate, passing to the

able. The Senate adopted the proposal, but it failed in conference (65 Cong. Rec. 68th Cong. 1st Sess. at p. 9536). A similar proposal was again made and rejected in 1935 (79 Cong. Rec. 74th Cong. 1st Sess. at pp. 12301, 13074).

Petitioner's Contentions.

Petitioner seeks (p. 17), to dismiss section 826-b as a redundant procedural regulation. We think its history and its analysis shows that it expresses the will of Congress as to where the burden of its tax shall fall.

Petitioner points instead with important emphasis to section 812-d of the Internal Revenue Code although in the courts below he did not refer to that provision until his motion for reargument in the Court of Appeals.

The provision was not adopted until 1924 (Revenue Act of 1924, sec. 303(a)(3). Prior rulings had allowed deduction from the decedent's gross taxable estate of any sum willed to charity (i.e. *Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61; *Union of New Haven Trust Co.* v. *Eaton*, 20 Fed. (2d) 419; *Howard T. Walter*, 2 B. T. A. 453 at 457;

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nearest and most beloved of the testator. • • • The inheritance tax I propose is broken up among the various beneficiaries, as it should be, and no one beneficiary of the estate is forced to pay for the transfer to all the beneficiaries. There need be no forced sales of property in the estate, for each beneficiary has the privilege of paying the tax on his share outright.

Again, the estate tax results in situations the decedent could not have intended. Thus, in Y. M. C. A. against Davis, decided February 18, 1924, by the Supreme Court, a testator left her residuary estate to the Y. M. C. A. and certain other benevolent organizations. The executor brought an action to determine whether the tax should be paid out of the residue which was given to these benevolent organizations or out of the various specific legacies. The court properly held under the law that the tax would be payable out of the residue, thereby greatly reducing the amount received by these charitable, educational, and religious organizations. Obviously, we should avoid this result if we can, and it can be avoided. Each beneficiary should pay his own transfer tax. It is wrong for the residuary legatee, often a charity, or the chief object of the decedents' bounty, to have to pay the taxes for the whole estate."

Matter of Colonial Trust Co., 19 B. T. A. 174). The single purpose of section 812-d was to limit that deduction to the amount actually received by charity—that is, after payment of the taxes of a State or any subdivision however imposed or divided and of the Federal government.

The several careful analyses of the history of the section intimate no other purpose—certainly none to affect the incidence of the tax (Commerce Clearing House Federal Tax Service, 1942, Par. 3526 *et seq.*, Prentice-Hall Federal Tax Service, 1942, Vol. 3, Pars. 23,401, 23,407 *et seq.*, Alexander Tax Service, Vol. 1, Par. 4108). The provision is a standard one, found in most death tax laws and in which the language could not possibly have the meaning now sought to be ascribed to it as authorizing the States to apportion the tax (i.e., N. Y. Tax Law, Section 249-s (3)). Its point is simply that any deduction made from the amount given to charity, whatever the source, must be accounted for in determining the exemption from tax.

The provision was not part of the federal estate tax from 1918 to 1924, and it was again omitted during 1926 to 1932. At best it would have afforded singularly intermittent regulation of the incidence of the tax. The truth is that petitioner's argument would have section 826-b repealed by the most devious implication from section 812-d.

POINT II.

The State of New York is without power to interfere with the incidence of the Federal Estate Tax.

First. Petitioner argues that Decedent Estate Law section 124 does not offend the Supremacy Clause even though section 826-b be construed "as definitely fixing for the purpose of the federal statute the incidence of the tax". It is maintained that the power of the State over distribution of prop-

erty at death may override the federal declaration as to how the federal tax on that property shall fall. Presumably petitioner would also maintain that New York in *the exercise of the same power* could thrust the federal tax upon charity though Congress command that the charity be not taxed.

Many authorities in addition to *Irving Trust Co.* v. *Day* (brief for pet., p. 19) expound the extent of the power of a State over distribution of estates. The majority below took full notice of them (i.e., *Mager* v. *Grima*, 8 How. (U. S.) 490, cited in the opinion below at R. 99 and 109). But none of them involve any question of a conflict with a federal command in a field in which Congress is competent to command, such as with respect to the incidence of its own tax. On the contrary, it is clear that because of the Supremacy Clause—State inheritance laws are subordinate to supervening federal treaties which affect inheritances in the States (*Santovincenzo* v. *Egan*, 284 U. S. 30 at 40; *Nielson* v. *Johnson*, 279 U. S. 47).

Other familiar decisions similarly limit this power of the States over inheritances where it is employed so as to tax extraterritorial values, thus impairing the design of the federal system (*Frick* v. *Pennsylvania*, 268 U. S. 473 at 495; T. R. Powell, Abolition of the Federal Inheritance Tax, printed in 67 Cong. Rec. 69th Cong. 1st Sess. at p. 3797 (1926); cases cited in *Burnet* v. *Brooks*, 288 U. S. 378 at 401 *et seq.*). The controlling principle is that the "most characteristic" of reserved State powers, even such as in the local administration of the estates of its decedents or with respect to the jurisdiction of its own courts, may not be exercised so as to frustrate any federal purpose (*Burnes Nat'l. Bank* v. *Duncan*, 265 U. S. 17, especially at p. 24 per Mr. Justice Holmes; compare *Terral* v. *Burke Constr. Co.*, 257 U. S. 529).

The federal power to tax at death and to fix the incidence of its tax is not subordinate to any State power. It has been authoritatively pointed out that the field of the federal

death tax is at least as broad as that of the States (T. R. Powell, Extra Territorial Inheritance Taxation, 20 Col. Law Review 1, at 19-21). Both State and Nation may function concurrently in this field. Here in truth are *co-ordinate* powers under our federal system. The States have no standing to regulate, much less to infringe upon, the functioning of the federal tax power.

Petitioner's alternative claim (Point III, pp. 20-1) is that the State is competent either to dictate how the testator shall draw his Will, or to interpret it, and may therefore fix for him the incidence of the tax. We do not recognize in this a different contention. If the State may not overrule Congress in the guise of exercising authority over the distribution of estates, it may not claim that power by virtue of its authority over the making of or interpretation of wills.

The remaining contentions rest upon interpretation of section 826-b which deny its meaning as we have presented it (Point I, *supra*).

Second. Petitioner suggests that section 826-b is "incomplete" as to the ultimate incidence of the tax—that is, that it merely directs how the tax should normally fall without at the same time inhibiting the States (pp. 17-18). The answer would seem to be that by section 826-b Congress nevertheless preempted the field concerned with the incidence of its tax. Even on the assumption stated, the section is certainly legislation in the field of the incidence of the tax—a field which has been under continuous reconsideration and where Congress has refused to alter that incidence except in one specific area (sec. 826-c). The States are therefore not free to impose their own contrary views as to what the incidence should be.

If Congress were tomorrow to add to its estate tax law a formula for apportioning the tax among the legatees (a

matter now under consideration for the pending tax bill, p. 4, *supra*), then Decedent Estate Law sec. 124 would doubtless be conceded to be ineffective. In that situation the asserted supremacy of the State power would be clearly seen to be without basis. The matter ought not to be less clear where Congress, after stating in 1916 its desire that the tax be paid out of the estate before distribution, has agreed to change the incidence thus fixed in only one limited area. In either case the field is occupied to the exclusion of the States.

Third. Petitioner also argues that the federal law is "silent" as to the "ultimate incidence" of the tax (pp. 18-19). This view of section 826-b requires a brief statement as to the sense in which the court below made its reference to the Uniformity Clause (R. 101-2, 104). The court held Congressional silence would not authorize State action here, but that express Congressional assent to such action would be essential before New York could disturb the nationwide and uniform incidence of the federal estate tax or any other similar national law.

The federal estate tax is a self-contained system which operates uniformly and without assistance or participation by the States. If each State were free to impose what it considers a fair system of apportioning the federal tax, diversity would ensue "as various and as numerous as the States" (*Easton* v. *Iowa*, 188 U. S. 220, 229).* In these circumstances the doctrine is that without express Congressional assent, New York may not even *supplement* the operation of the federal tax law,—much less fix its incidence in a manner in which the tax would not otherwise fall.

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* The experience of New York under Decedent Estate Law section 124 is that its appearance of simplicity is deceptive and that the matter of apportioning the federal estate tax in the manner there directed is enormously complicated (see E. G. Greeley, Estate Tax Apportionment in New York Journal of Accountancy, Oct. 1940).

Many recent decisions illustrate this, i.e., *Burnet* v. *Harmel*, 287 U. S. 103, where the question was whether State law could determine what is income for purposes of the federal tax. This Court held (p. 110):

> "Here we are concerned * * * with the * * * exercise of its plenary power (of Congress) to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. * * * State law may control only where the operation of the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

(See also *Flaherty* v. *Hanson*, 215 U. S. 515; *United States* v. *Snyder*, 149 U. S. 210 at 214; *Lyeth* v. *Hoey*, 305 U. S. 188; *Hines* v. *Davidowitz*, 312 U. S. 52.)

Also illustrative are the decisions forbidding State interference with or supplementation of the working of the federal banking system (*Farmer & Mechanics Nat. Bank* v. *Deering*, 91 U. S. 29, at 34; *Easton* v. *Iowa*, 188 U. S. 220, especially at pp. 238-9); with the bankruptcy system (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265; *Kalb* v. *Feuerstein*, 308 U. S. 433 at 439); with other federal powers such as over Indian affairs (*In re Heff*, 197 U. S. 488 at 508-9) or the maintenance of veterans' homes (*Ohio* v. *Thomas*, 173 U. S. 276); compare *Johnson* v. *Maryland*, 254 U. S. 51; *United States* v. *Owlett*, 15 Fed. Supp. 736; *In re Leaken*, 137 Fed. 680);—or indeed with the federal judicial system (Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345).

CONCLUSION.

This case involves the interpretation of section 826-b of the Internal Revenue Code in the light of its background and its history subsequent to enactment. Once that question is determined, only routine application of the principles of law established under the Supremacy Clause is required. As a practical matter, the issue in this case arises in narrow and unusual circumstances. The question whether to apportion the burden of its tax is one for adjustment by Congress alone, which now has it under consideration.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix.

INTERNAL REVENUE CODE SEC. 826. COLLECTION OF UNPAID TAX.

(a) *Sale of Property.*—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement Out of Estate.*—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of Life Insurance Beneficiaries.*—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

INTERNAL REVENUE CODE SEC. 822. PAYMENT OF TAX.

(a) *Time of Payment.*

(1) *General Rule.*—The tax imposed by this subchapter shall be due and payable fifteen months after the decedent's death.

(2) *Extension of time.*— * * *

(b) *Liability for Payment.*—The tax imposed by this subchapter shall be paid by the executor to the collector.

INTERNAL REVENUE CODE SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate.

(a) *Exemption.*—An exemption of $100,000;

* * * * * *

(d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational pur-

poses, * * * If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

NEW YORK DECEDENT STATE LAW §124. APPORTIONMENT OF FEDERAL AND STATE ESTATE TAXES; EXECUTOR OR ADMINISTRATOR TO DEDUCT TAXES FROM DISTRIBUTIVE SHARES

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law,[1] or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted,[2] upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit

of each such person bears to the total value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount

of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty. Added L. 1930, c. 709.

NEW YORK TAX LAW §249-t. JURISDICTION OF THE SURROGATE.

1. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent which estate is subject to tax under this article, or to appoint a trustee of such estate, or any part thereof, or to grant ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, including specifically, but without limitation, jurisdiction to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENT, HAROLD W. HASTINGS, SPECIAL GUARDIAN

HAROLD W. HASTINGS,
SYDNEY A. HELLENBRAND,
Counsel for Respondent Harold W. Hastings.

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Respondents.

No. 30

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENT, HAROLD W. HASTINGS, SPECIAL GUARDIAN

This brief is submitted on behalf of those infants who constitute the remaindermen of the trust created by paragraph "Eighth" of the will of Josephine del Drago, deceased.

The Proceedings

The Last Will and Testament of Josephine del Drago was dated March 27, 1934 and was admitted to probate on April 6, 1938 (R. 15, 16, 32). In that will the testatrix,

among other provisions, made an outright bequest to her husband of $300,000 and created a trust in the sum of $200,000 for the life benefit of Marcel del Drago, with the remainder to the infants whom this special guardian represents. She also created a trust of the residue of her estate. The infant remaindermen of the latter trust are represented by Lawrason Riggs, Jr., as special guardian.

The executors herein brought on a proceeding for a voluntary accounting. The account reflected that the executors had paid approximately $230,000 on account of federal estate taxes (R. 24), and sought a determination of the apportionment of that tax pursuant to Section 124 of the Decedent Estate Law of New York (R. 18, 24).

Objections to an apportionment were filed on the ground that the provisions of Section 124 were unconstitutional and that therefore the payment of the federal estate tax was to be borne by the residuary estate and not by the legatees (R. 24, 28).

Thereafter, Surrogate Foley, in a decision reported in 175 Misc. 489, overruled these objections and ordered that the tax be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law (R. 55).

The application of Section 124 of the Decedent Estate Law frustrates the intent and wishes of the testatrix. She created in her Will a trust fund of $200,000 in which her stepson, Marcel del Drago was the life beneficiary and certain infants the remaindermen.

The effect of the statute is to reduce the corpus of this trust approximately 25%. Certainly it was not the intent of the testatrix that such an event occur.

An appeal was taken directly to the Court of Appeals of the State of New York, which court reversed the determination of the Surrogate (*Matter of del Drago*, 287 N. Y. 61) (R. 62).

This matter is before this court on a writ of certiorari which was granted on March 30, 1942.

The Question Involved

The sole issue to be determined is whether Section 124 of the New York Decedent Estate Law is contrary to and in conflict with legislation enacted by Congress dealing with federal estate taxes and, therefore, unconstitutional.

Summary of Our Contention

We shall urge that Congress in the enactment of the Federal estate tax law desired and intended that such taxes should fall upon the residuary estate and not upon the legatees or beneficiaries under a will. Indeed, Congress has so indicated by explicit provisions.

Section 124 of the Decedent Estate Law provides, in substance, that the federal estate tax shall be apportioned and prorated among the legatees and shall be paid by them.

The state legislation seeks to change the incidence of the tax imposed by Congress on estates of decedents. Such legislation is in direct conflict with the Supremacy Clause of the Constitution of the United States.

POINT I

Congress intended that the Federal Estate Tax shall fall upon and be borne by the residuary estate rather than the legatees.

The Federal Estate Tax is a levy upon the estate before distribution is made to the beneficiaries. It is not a tax upon the shares into which the estate is divided, nor is it a tax imposed upon a person's privilege of receiving property under a will. It is a tax upon the transfer of the estate at the time of death, upon the interest that ceases at death.

Edwards v. *Slocum*, 264 U. S. 61;
Y. M. C. A. v. *Davis*, 264 U. S. 47;
N. Y. Trust Co. v. *Eisner*, 256 U. S. 345;
Knowlton v. *Moore*, 178 U. S. 41.

It has been written wisely and with foresight that "These differences are not merely theoretical. They may carry practical consequences." (*Matter of Vanderbilt*, 281 N. Y. 297; affd. 309 U. S. 530.)

In *Knowlton* v. *Moore*, *supra*, this court considered the federal death tax then in existence. That law specifically provided that the tax levied shall fall upon and be borne by the legatees of the distributive shares. Obviously, that legislation was very similar to the provisions of Section 124 of the Decedent's Estate Law. The court in an elaborate opinion laid down and applied the rule that a tax upon a legacy is measured by the size of the estate rather than the size of the legacy, would cause "profound inequality". The court wrote:

> "The tax is on each separate legatee or distributive share, and the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legatees, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying * * * that the house of A, which is only worth $1,000, may be taxed, but that the rate of tax is to be determined by attributing to A's house the value of B's house, which may be one hundred fold the amount. The gross inequalities which must inevitably result * * * are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeathes to a hospital $10,000. The rate of tax would be 5%, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeathes $10,000 to the same institution. The rate of tax would be 12½% and the amount of the tax $1250. It would thus come to pass that the same person occupying the same relation, and taking in the same character two equal sums from two different persons, would be in one case more than twice the tax than he would pay in the other."

The opinion then levels the warning that the estate tax is outlawed if its burden is placed upon the persons receiving the specific shares. "It may be doubted", said Mr. Justice White,——

> "aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations

> arising from those fundamental conceptions of free government which underlie all constitutional systems."

Well aware of this decision the Congress in 1916 enacted the Federal Estate Tax.

Certainly, it is quite unreasonable to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions which were not rendered until several years later (*Burnet* v. *Brooks*, 288 U. S. 378). Congressional legislation must be interpreted "in the light of the circumstances as they existed when the statute was passed" (*Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467.)

In the enactment of the Federal Estate Tax, the Congress had the assistance of committees. Hon. Cordell Hull, the author of this legislation, made this statement (53 Cong. Rec., 64 Cong., 1st Sess., pp. 10656-7):

> "* * * The State Laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation."

Likewise, the Legislative committee made similar remarks (House Rep. 922, 64 Cong., 1st Sess., p. 5):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs.

> Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax *upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.*"

Obviously, the Federal estate tax was not to fall upon the shares, as did the State Taxes.

The clear intent of Congress as to the incidence of the Federal Tax is reflected in the following statement by Mr. Hull (Cong. Rec., *supra*, p. 10657):

> "Under State share tax laws the estate is divided and subdivided, until the shares become so small that even very high rates afford but comparatively small and disappointing revenues. *Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution,* and distribution then made under the same rule that would otherwise govern the estate. *Where a decedent makes a will he can allow the estate tax to fasten on the net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert * * * provision in his will, the effect of which would more or less change the incidence of the tax.*"

Congress was so deliberate and careful in its intention that the tax not be deemed a legacy tax falling upon the shares of beneficiaries, that it enacted another section which provides that where a person other than executor pays any part of the estate tax, such person shall be reimbursed out of the estate.

The statute is Section 826-b of U. S. C. A., which provides:

"Sec. 826-b. REIMBURSEMENT OUT OF ESTATE. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced had the tax been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The first portion of this statute clearly indicates the intent of Congress. It not only provides that the tax is to fall upon the residue and that the tax is not to fall upon the shares, but it provides for reimbursement and contribution so as to insure that the shares will not bear the tax.

The statute calls for "reimbursement" from the executor to one who has paid the tax and not contribution.

The courts which have considered section 826-b have consistently ruled that the Congress intended to place the tax upon the estate and not upon the beneficiaries and have refused to direct apportionment of the tax.

Matter of Oakes, 248 N. Y. 280;
Matter of Hamlin, 226 N. Y. 407.

In *Matter of Oakes, supra*, Mr. Justice Cardozo wrote:

"* * * The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole and,

primarily at least, is a charge upon the residue. (Matter of Hamlin, 226 N. Y. 407) * * *.

"*The command of the statute is explicit as to the incidence of the burden.* 'If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the person whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, * * * it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.' (40 Stat. 1096, 1100, c. 18, Sec. 408, Revenue Act of Feb. 24, 1919; *Farmers Loan & Trust Co. v. Winthrop, supra,* p. 497.) *The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been* modified by the will * * *"

In *Matter of Hamlin, supra.* the court wrote:

"The plain intent and obvious meaning of the act of Congress under consideration, especially when considered in connection with the facts surrounding the enactment of the same, indicate clearly, that the act imposed 'an estate tax' as distinguished from an inheritance tax, that the tax payable by the estate rather than by the legatees, * * *"

Indeed the constitutionality of this federal estate tax was sustained because this court stated the tax to be upon the residue and not upon the persons taking shares from the estate.

The case which sustains the tax is *New York Trust Co.* v. *Eisner*, 256 U. S. 345, where the court said:

> "The tax is not imposed upon them (the residuary legatees) but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States."

This same principle was expounded by the court below (263 Fed. 620), which wrote:

> "The doubt as to validity expressed in that case (*Knowlton* v. *Moore*), was limited to measuring a tax upon the succession of each individual legatee to a specific legacy by the value, not of his legacy, but of the entire net estate of the decedent; it did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax,—*to measure it by the value of the net estate and to cast the burden upon the residuary personal estate.*"

Unquestionably, the Federal estate tax falls upon the residue and not upon the beneficiaries or their shares. Such was the will and intent of Congress.

Further proof of the intent of Congress is found in the history subsequent to the enactment of the Federal Estate tax law.

In 1918 and 1919 there was an attempt made to amend the tax law so as to remove the incidence of the tax from the residue and have the tax specifically fall upon the legacies. (65 Cong., 3rd Sess., H. R. Rept. No. 1037, pp. 70 *et seq.*) This attempt was unsuccessful.

A renewed proposal for substitution of a legacy tax in place of the Federal estate tax was made and rejected in 1921. (61 Cong. Rec., 67th Cong., 1st Sess., at pp. 6922, 5833-40.)

In 1924 another effort was made to substitute a legacy tax (65 Cong. Rec., 68 Cong., 1st Sess., pp. 8034 *et seq.*). One of the reasons for this proposal was stated to be that the incidence of the estate tax upon the residue was objectionable and not fair. This attempt was also rejected. A similar proposal was again made and rejected in 1935 (79 Cong. Rec., 74 Cong., 1st Sess., pp. 12301, 13074).

Only one change was made. In 1918 Section 826-c was added. This section provides that the tax attributable to proceeds of insurance policies should be apportioned among the beneficiaries of the insurance. It is a specific exception to the provisions of section 826-b. This exception warrants strict construction. As Chief Justice Rugg wrote in *Bemis* v. *Converse*, 246 Mass. 131 at page 134:

> "The presence of this provision indicates that no further apportionment was intended by Congress."

It is significant that it was Congress and not the State who made the change in the incidence of the tax on insurance proceeds. If Congress had no interest in who was to pay the estate tax, it never would have enacted Section 826-c.

POINT II

State legislation is without power to change, overrule or interfere with Federal legislation.

Such a situation is specifically prohibited by Article VI, clause 2 of the Constitution of the United States, which provides:

> "This constitution and the laws of the United States which shall be made in pursuance thereof • • • shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Unquestionably Congress has the power to lay and collect taxes on decedents' estate and to determine where those burdens should rest. Such acts of Congress are the supreme law of the land and state legislation, if in conflict with the federal law, is a nullity though enacted in the exercise of concurrent and not controverted powers (*Florida* v. *Mellon*, 273 U. S. 12, 17; *Gibbons* v. *Ogden*, 9 Wheat. 1).

It is obvious that the Federal estate tax law creates an independent and complete revenue system.

The statute requires the filing of a separate tax return. The federal authorities make their own determination of the property subject to tax and its value. The statute provides independent methods and machinery for the levy, enforcement and collection of the tax.

Every detail necessary to make it complete is present. The system needs no assistance from the States.

Such being the fact Congressional legislation and Congressional intent may not be overridden by State legislation. The exercise by Congress of federal powers is supreme.

In *Lake Shore & Michigan Rwy.* v. *Ohio*, 173 U. S. 285, this court held:

> "Where Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching the

matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government."

The same principle is often stated as "the laws of the United States are the laws of the several states" (*Hines* v. *Lowrey*, 305 U. S. 85), and that such laws are "the laws of the individual states and of all the people of the United States" (*Erickson* v. *Macy*, 231 N. Y. 86).

It seems plain that there is actual conflict between the Federal law and Section 124 of the Decedent Estate Law.

The federal law regulates and fixes the incidence of the estate tax. It directs that it should fall upon the residue and that it should be paid therefrom by the executor. It makes express provision for reimbursement from the executor to any person who might have paid the tax or any portion thereof.

Section 124 of the Decedent Estate Law is to the contrary. It directs and commands that the executor, after payment of the estate tax, shall have reimbursement from the legatees—the very same persons who under federal law are entitled to restitution and reimbursement from the executor. In fact, the state permits an executor to withhold distribution of a legacy to assure a *pro rata* contribution of the estate tax.

Both statutes affect the sole and single question of who is to bear the burden of the federal estate tax. Congress has said that it is to be the residue and not the legatees, whereas, the State has said that it is to be the legatees and not the residue.

Obviously the state law cannot be reconciled and read in harmony with the federal law.

Certainly a State may not, under its power over devolution of property, burden legatees with a federal estate tax which Congress has commanded shall fall upon the residue of the estate and not upon the shares of the legatees.

Only Congressional permission, expressly given, can change the incidence of the Federal Tax.

This Court in *Burnet* v. *Harmel*, 287 U. S. 103, in determining whether certain payments were income, wrote:

> "Here we are concerned only with the • • • exercise of its plenary powers (of Congress) under the Constitution, to tax income. *The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give uniform application to a nationwide scheme of taxation.* • • • *State law may control only when the operation of the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.*"

Similarly, only Congressional permission expressly given, can authorize a state to interfere with a complete federal system.

This principle was laid down in *Farmers & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29:

> "• • • The States can exercise no control over them (the national banks) nor in anywise affect their operation, except in so far as Congress may see proper to permit. • • • The States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

Very interesting language is found in *Tarble's case*, 13 Wall. 397. There a State was denied the power to issue *habeas corpus* to question the detention of a person under federal right. The court wrote:

> "There are within the territorial limits of each State two governments * * * independent of each other and supreme within their respective spheres. Each has its separate departments, each has its distinct laws; and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other * * *. In their laws, and modes of enforcement, neither is responsible to the other. *How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, and by what officers * * * are matters subject* to their own control, and in the regulation of which neither can interfere with the other."

POINT III

Section 812-d, of the United States Internal Revenue Code cannot have any effect on the plain direction of Congress that the incidence of the basic estate tax shall fall on the residuary, as expressed in Section 826 of the said code.

The sentence, "If the tax imposed by Section 810, or any estate, succession, legacy, or inheritance taxes, are, either by terms of the will, by the laws of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deducti-

ble under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes * * *.", is a part of the paragraph of Section 812 called "d".

Such paragraph describes what charitable bequests are to be deducted from the gross estate so as to arrive at the net estate taxable. Similar language appears in Section 861, subdivision 3. It is apparently for the sole purpose of limiting the amount of deductions for charitable bequests and states that if a deduction from the gross estate is claimed because of a charitable bequest, that the amount of such deduction can only be the net amount of the legacy by whatever means such legacy is reduced.

Clearly, the use of such language as appears in those sentences can be no argument that Congress meant that the incidence of the tax shall be left to the individual states. All that can be claimed for them is that Congress recognized that on some occasions charitable bequests may be taxed and, if so, Congress wanted it made clear that no greater deduction could be allowed than the amount actually transferred to the legatee by such bequest.

Congress was not referring to the incidence of the tax in that section of the law. We repeat, all that Congress meant by that was that it recognized that the charitable bequest could be reduced in a number of ways and desired to make it clear that the only deduction allowed was the amount of the charitable bequest that was actually to be paid out.

Section 826 shows plainly where the incidence of the tax must fall. Sections 812, subdivision d, and 861, subdivision 3 do not change that intent. If Congress had intended that the incidence of the Federal tax could have been shifted by the States, Section 826 would certainly have been changed.

POINT IV

Hardships of the decision, if any, are not material.

The observations, statements and arguments in the petitioner's brief in regard to the hardship of the decision are, we respectfully submit, beside the point. No matter what hardship may be caused by such determination, it can have no weight in deciding a question of law. Both opinions of the Court of Appeals show that the issues and questions were thoroughly considered as was the practical effect of the decision.

Therefore, we do not feel that this argument need be further discussed other than to quote the following pertinent language from the Supreme Court of the United States in the case of *Crooks v. Harrelson,* 282 U. S. 55, page 60:

> "Laws enacted with good intentions, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the Courts."

CONCLUSION

Congress in the enactment of the Federal Estate tax fixed the incidence of the tax and made explicit provision that the burden shall fall upon the residue of the estate and not upon those receiving shares of the estate.

Section 124 of the New York Decedent Estate Law specifically alters and conflicts with the federal law in that it attempts to change the incidence of the federal estate tax and places the burden upon the legatees.

The order of the Court of Appeals of the State of New York and the order of the Surrogates' Court of New York entered on the remittitur of the Court of Appeals should be affirmed.

Dated: October 10, 1942.

Respectfully submitted,

HAROLD W. HASTINGS,
SYDNEY A. HELLENBRAND,
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Harold W. Hastings.

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Supreme Court of the United States

OCTOBER TERM—1942

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Petitioner,

—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO

HENRY COHEN,
LUDWIG M. WILSON,
SIDNEY BARROWS,
Counsel for Respondents Giovanni Del Drago and Marcel Del Drago.

Law Brief Press—NYC

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Supreme Court of the United States

OCTOBER TERM—1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—against—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO

The decision of the New York Court of Appeals (reported in 287 N. Y. 61) invalidates under the Supremacy Clause so much of New York Decedent Estate Law sec. 124 as seeks to change the incidence of the federal estate tax. It rests upon alternative grounds.

The Court of Appeals first examined the history and background of the tax, from which the Court concluded that "Congress has acted in the field" and "has expressly directed the manner of payment of such duties and excluded specific legatees from bearing the burden of any such levy" (R. 71). The invalidity of sec. 124 under the Supremacy Clause of the Federal Constitution was thought to follow.

The Court found several reasons why Congress should have wanted to adopt a tax which would not fall upon, or be distributed among, the legatees under a will (R. 65).

The Court of Appeals also held that even if Congress had not so explicitly indicated its purpose, New York could not change the incidence of the tax because in the circumstances and in view of the nature of the power exercised "silence does not give consent but implies only that there shall be no interference with the federal scheme" (R. 71). Underlying this view is the belief that the federal estate tax system is a comprehensive and independent taxing system and that the States are not free to disturb its uniform incidence.

The dissenting opinion in the Court of Appeals acknowledges this "command of the federal statute that * * * the tax be paid out of the net estate" (R. 79). But it asserts that Decedent Estate Law sec. 124 is not in conflict with that command because, it is further asserted, Congress was and is indifferent to the incidence of its tax. This assertion of fact derives from and is supported principally by reference to the *dictum* in Judge Hough's opinion in *Edwards* v. *Slocum*, 287 Fed. 651 at 653, aff'd. 264 U. S. 61.

That *dictum* is plausible, but it is incorrect (p. 10 *et seq.*, *infra*).

The Purpose of Decedent Estate Law Sec. 124.

Decedent Estate Law sec. 124 was adopted in 1930 when New York substituted an estate tax for its prior inheritance tax (Laws 1930, c. 709; see *Whitney* v. *Tax Commission*, 309 U. S. 530, 536). It was put forward as insuring a more equitable incidence for the new estate tax than would otherwise ensue. But this belief must be viewed in the light of its New York history.

Before 1930, the death duty in New York was a "share" tax falling upon the recipients of legacies or distributive shares (Tax Law, Arts. 10 and 10-A). The objection to an estate tax falling upon the estate itself was that it disturbed local practice and would affect wills drawn by lawyers accustomed to a different tax incidence. On precisely this ground, Governor Smith in 1928 and Governor Roosevelt in 1929 vetoed bills for an estate tax (S. Pr. #1913, Int. # 1093, April 5, 1928; A. Pr. #1041, Int. #967, April 15, 1929). Governor Smith in his veto message observed that "under the estate tax as proposed by this bill the entire tax is paid by the residuary legatee"* while "under a transfer tax system which our State has consistently followed, each legatee and each beneficiary pays the tax on the benefit that he derives from the estate." And he rejected the bill because "this bill radically changes the system established for over 40 years by the State of New York for the taxation of the estates of deceased persons."

When the measure was reintroduced in 1930, sec. 124 (Appendix 2) was substituted for the provision directing the incidence of the tax upon the estate. But it does not merely prescribe the incidence of the New York tax. It also shifts the incidence of the federal estate tax from the estate and on to the legatees. The purpose to substitute local for national uniformity is also evident from the statement made on the floor of the State Senate.**

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* The bill contained a provision (sec. 249-bb) identical with the federal law (now 26 U. S. C. A., sec. 826-b—see Appendix 1), which directs that the tax should fall on the estate.

** "At the present time the federal tax is against the residuary legatees. Under the present law of the State of New York the inheritance tax is distributed. What we are proposing now is that both the State tax and the federal tax shall be allocated by the Surrogate to the legatees or distributees in accordance with their interests" (Senator Mastick, April 10, 1930).

The rejected provision of the proposed law, the cause of the Gubernatorial vetoes, had declared the legislative "purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution," and it made provision for reimbursement from the estate for a legatee who had been made to bear "any part" of the tax (see pp. 21-24, *infra*). It is the provision made in the federal law (26 U. S. C. sec. 826-b; Appendix 1). Sec. 124 reverses it and makes the opposite provision for reimbursement: the executor does not make reimbursement of the federal tax to the legatees, he receives reimbursement from them.

The incidence of the federal estate tax. The federal estate tax (26 U. S. C. A. secs. 810, *et seq.*) is not an "inheritance" or "transfer" tax upon the privilege of receiving property by will. It is a tax upon the estate, upon the interest which ceases by death (*cf. Knowlton* v. *Moore*, 178 U. S. 41 esp. at 48, *et seq.*). It is a levy upon the estate before its distribution to any of the beneficiaries, and it falls upon the residue and is not apportioned among the legatees.

Many decisions so fix its incidence, refusing to apportion its burden (*Matter of Hamlin*, 226 N. Y. 407, cert. den. 250 U. S. 672; *Farmers L. & T. Co.* v. *Winthrop*, 238 N. Y. 488, cert. den. 266 U. S. 633; *Matter of Oakes*, 248 N. Y. 280, per Cardozo, *J.*; *In re Newton's Estate*, 74 Pa. Super. Ct. 361; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471; *Turner* v. *Cole*, 118 N. J. Eq. 497; *Bemis* v. *Converse*, 246 Mass. 131; *Ericson* v. *Childs*, 124 Conn. 66, reviewing the authorities; compare *New York Trust Co.* v. *Eisner*, 256 U. S. 345; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Edwards* v. *Slocum*, 264 U. S. 61).

The petitioner does not dispute the soundness of these holdings but rather assumes that they illustrate a "local" and "judge made" rule of "state law" (br. pp. 8, 12, 47

footnote, 37, 44). But they determine a question involving the meaning and the effect of a federal statute. We should have thought this to present a federal question to be answered in the light of the Congressional intent rather than upon the varying standards of State law, for "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Realization Corp.* v. *Geist*, 316 U. S. 89 and cases cited at p. 95; *cf. Lyeth* v. *Hoey*, 305 U. S. 188 discussed pp. 39-40, *infra*; Cheatham, Review, 55 Harv. L. Rev. 167-8). Such is the assumption of the carefully considered opinions of the New York and Massachusetts Courts, *supra*, which do not speak at all of local policy but reach their conclusions upon careful appraisal of the evidence regarding the intent of Congress.

In any event, it is clear that the point which petitioner thus assumes is the very point at issue in the present case: whether New York is in truth free to reverse the incidence of the tax imposed by the national government.

The equities of sec. 124. Although substantial opinion supports the view that in New York it is more equitable to apportion death taxes rather than to allow their incidence to fall upon the estate,* it is enough to note here (as the Court of Appeals has noted on three separate occasions) that the matter is susceptible of difference of opinion (*Matter of Hamlin, supra*, 226 N. Y. at 420; *Farmers Loan and Trust Company* v. *Winthrop, supra*, 238 N. Y. at 496-7; opinion below, R. 103).

Moreover, the federal law seems to have been written upon the opposite premise. The result of apportioning an estate tax is that the general legatees bear a tax measured, not by

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* We assume that the investigation by the New York Commission into this question of fact was more thorough than its investigation of the constitutional power of the State. The Commission cited only the dictum of Judge Hough (pp. 10, 27, *infra*) and *Hill* v. *Grissom*, 299 Fed. 641, an irrelevant decision (see pet. br., pp. 10-12).

the size of their legacies, but by the amount of the net estate. Injustice will often ensue and inequalities are unavoidable—as, for example, where a small legacy is given out of a large estate. The strongest animadversions upon any such method of measuring the tax will be found in the leading case in this Court on federal death taxation, where Mr. Justice White warned in no uncertain terms of its "profound inequality" (*Knowlton* v. *Moore*, 178 U. S. 41 at 77; see also *Matter of Sherman*, 179 App. Div. 497 at 500, aff'd 222 N. Y. 540; *Newton's Estate*, 74 Pa. Super. Ct. 361; *cf. Matter of Adler*, 151 Misc. 338). When a testator leaves a general legacy of a specific sum of money, it is difficult to be certain that it is always fair to reduce that sum by way of taxes, since the result is only to augment the necessarily indefinite residuary estate. Indeed the *relevance* of imposing upon a general legacy a tax measured not by the size of the legacy but by the size of the estate from which it comes is not apparent (*Farmers Loan & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 496-7).

In the present case, sec. 124 does operate unjustly. The respondents, husband and stepson of the testatrix, are her general legatees (R. 50-51). Comparison of her earlier Wills discloses that they were the natural and the only consistent objects of her bounty (R. 42, 44, 45-6, 48). Comparison also shows that the draftsman of her Will overlooked the effect of the new sec. 124 upon their legacies when in 1932 he drew a codicil and republished the prior Will (R. 45); and that her last Will merely perpetuated that error. But sec. 124 will substantially reduce their legacies—by approximately twenty per cent.—and will confer the benefit of that reduction upon infants in Italy who are favored for the first time in her last Will (R. 50-51, *cf.* R. 48-9, 46-7).

It is thus apparent that there is basis for the observation by the draftsman of the federal estate tax (Mr. Cordell

Hull) who in 1916 described the incidence of the federal tax as "this *equitable* method of imposing it upon the entire net estate before distribution" (p. 14, *infra; cf. Stebbins* v. *Riley*, 268 U. S. 137 at 145). And Congress has since directed apportionment of the tax in limited respects only and in circumstances which strongly suggest that only in those respects did such distributed incidence appear "more equitable" (pp. 33-35, *infra*).

The truth would seem to be that there is no panacea; that no single rule will do justice in all circumstances. What is clear, however, is that under the federal law the testator may regulate the incidence of the tax (26 U.S.C.A. sec. 826-b); and the least experienced of draftsmen will write a tax clause in a Will as quickly as he provides for payment of debts and funeral expenses (see Report to National Conference on Estate and Inheritance Taxation, Nov. 10, 1925, pp. 37-9). Consequently we find it difficult to subscribe to the implication of counsel that many Wills have been written in New York upon the assumption that they will be governed by section 124 (pet. br., p. 12). Statutes change while the words of a Will do not.

Summary of Argument.

Section 124 of the New York Decedent Estate Law is in conflict with the federal estate tax law and unconstitutional under the Supremacy Clause (Const. Art. VI, cl. 2);

First, it conflicts with the purpose of Congress (actually expressed in sec. 826-b, Internal Revenue Code) that its tax fall upon the estate—a purpose rendered necessary by objections from the States, as well as by constitutional considerations;

Second, it interferes with the tax in a pecuniary way; and

Third, it interferes with the uniform operation and incidence of the tax without Congressional assent to such interference.

These conflicts are not justified by reliance upon the reserved power of the States over the distribution of estates.

1.

Congress stated its purpose in sec. 826-b of the Internal Revenue Code where it directed that: "unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Decedent Estate Law sec. 124 is in actual conflict with that command.

Congress was not indifferent to the incidence of the tax; neither did it seek to discriminate against residuary legatees. Congress designed the tax to fall upon the estate itself because it desired that its tax should not be distributed among the legatees like the existing legacy taxes levied by the States. Congress intended that the tax should harmonize with and be a supplement to the State taxes and not merely be superimposed upon them. In view of the political and constitutional setting in 1916, any other kind of federal death tax was inexpedient.

Today section 124 constitutes as a practical matter a barrier to Congressional adoption of legacy taxes as part of a comprehensive and perhaps exclusive system of death taxation—fields which must however be left open for future action.

2.

Section 124 actually interferes with the federal estate tax in that it reduces the sum otherwise due to the United States in any case in which any or all of the residue of the estate is given to charity—reducing the tax substantially.

3.

Congress has had continually under consideration the question whether it should alter the incidence of its estate tax. It has in fact adjusted the incidence of the tax in certain particulars, but has declined to do so broadly. There is no room for further adjustment by the States.

In any event, in this field the absence of Congressional assent to State regulation implies that there shall be no interference by the States. Otherwise the national tax system cannot operate uniformly, particularly since State regulation of the incidence of the federal tax is inappropriate and often unworkable.

4.

The States have reserved power over the distribution of estates, but—unless the Supremacy Clause is to be forgotten—that does not justify their interference with the incidence of the federal tax as designed by Congress. Suggested presumptions concerning the intention of the testatrix or of Congress with respect to sec. 124 only beg the question.

This Court observed, in 1893, that it faced for the first time the attempt of a State to interfere with federal taxation (*United States* v. *Snyder*, 149 U. S. 210 at 214). There has since been only one such instance (*Flaherty* v. *Hanson*, 215 U. S. 515). This is hardly surprising. Why should the States be free to regulate the incidence of *any* tax levied by

the national government? Surely no one would so intimate with respect to the payroll tax under the Social Security Law, or a federal sales tax placed on the seller and not the buyer. Taxes are often instruments of social policy and their incidence the major factor in the effectuation of that policy.

POINT I.

Congress placed the incidence of the tax upon the estate because it desired that the tax should not be distributed among the legatees.

We address our attention to the claim, insistently put forward in the briefs before this Court and in the dissenting opinion below (R. 75, *et seq.*), that Congress had no interest in fixing the incidence of its estate tax—a claim which undoubtedly has had currency, due principally to the words of Judge Hough in *Edwards* v. *Slocum* (see p. 27, *infra*). But we recognize no substitute for examination of the evidence.

The fact is that Congress intended, when in 1916 it enacted its first estate tax, that the tax should not fall like an "inheritance" or "share" tax upon each of the shares. In order to avoid conflict with the States, the tax was designed to fall differently from existing State taxes and upon the estate only. It was pointed out at the time that this must mean that the tax is taken from the residue of the estate and not the shares. And provision was accordingly made (Revenue Act of 1916, sec. 208, now I. R. C. sec. 826-b).

But it is a misconception of the decision below, to urge that it finds that Congress was motivated by the sole purpose to thrust its tax upon the residue of any estate. Its different point was twice stated: that Congress wanted its tax to fall

"without recourse to the individual legatees" (R. 73, 66). The consequence follows naturally that the tax must fall upon the residue when there is a residue.

The Political Background in 1916.

The estate tax of 1916 was the first federal death duty adopted in peacetime. At the time of its proposal it met with intense opposition in behalf of the States. It was preceded by ten years of debate by economists and tax experts (Schultz, Inheritance Taxation, pp. 155-6). The argument earnestly advanced—on theoretical as well as practical grounds—was that taxation at death is the prerogative of the States which the federal government ought not to invade.*

The Congressional answer to these objections lay in the fact that the States were not then occupying the whole field of death taxation.

Identical Committee reports on the bill placed their emphasis on that fact. They pointed out that although forty-two of the States were levying death taxes in 1916, none was an estate tax; that in each State the tax was a legacy tax, falling upon the recipients of the shares; and that in twelve of the States the tax was imposed only upon collateral relations (House Rep. #922, 64th Cong., 1st Sess., p. 5). It was therefore insisted that a federal tax which would be confined to the estate and which would not fall

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* As petitioner states, "practically the entire discussion of the revenue bill so far as it dealt with the estate tax revolved around this question" (br. pp. 29-30). See 53 Cong. Rec. 10659, 10730, 10731, 10752, 10761, 13043, 13044, 13060, 13130, 13188, 13191, 13192, 13297, Appendix at 1403-5, 1406, 1408, 1499, 1708, 1709.

The National Tax Association consistently opposed a federal estate tax on these grounds (Proc. Nat. Tax Cong. 1907 at p. 662; 1908 at p. 25; 1912 at pp. 176-9, 195-7).

Some of the States also opposed, i.e. Rhode Island Laws 1916 at p. 382; and compare 53 Cong. Rec. App. 1404 *et seq.*

upon the shares would not compete with the taxes of the States. On the contrary it was stated that the two systems would supplement one another.

Of course the States opposed adoption of federal death taxes whatever their nature; but what is relevant here is the manner in which that opposition was met and overcome.

Mr. Hull's Statement.

The underlying conception was stated on the floor of Congress by Mr. Cordell Hull (53 Cong. Rec. 10656-7). Mr. Hull has admitted to authorship of the estate tax law (Nat. Confer. on Inheritance and Estate Tax; Feb. 1925, pp. 104-5).

Mr. Hull in his statement took note of the opposition in behalf of the States. He referred to the systems of death taxation prevalent on the continent of Europe, and in Great Britain. He pointed out that in those countries the national government collected all death taxes and remitted a portion to the political subdivisions. He further observed that the British death tax system simultaneously levied *both* estate and inheritance taxes. This is not unusual. This Court had earlier noted in *Knowlton* v. *Moore*, 178 U. S. at 51 that the federal death tax of 1864 was in this respect a copy of this dual English system (see Appendix 3, at p. 54 *et seq.*, *infra*).

During and immediately following the first world war, after sustained periods of agitation for such a system: France, Germany, Austria and most of the British possessions adopted Estate taxes as a supplement to their existing legacy taxes. (Schultz, Inheritance Taxation (1926) pp. 18-29, 75, 77, 80, 91, 96, 214; Hanson, Death Duties, appendix; Proceedings of Nat. Con. on Inh. & Estate Tax (Feb. 1925) pp. 59-60; Paul Jaeggy, Erbschafts und Schenkungs Steuer abhandlungen aus dem Schweizer Recht, Pamphlet 88, c. 9, p. 17.) Indeed Congress in 1935 very nearly adopted a legacy tax as an addition to the Estate Tax (p. 29, *infra*).

Where the rates are properly adjusted, the two forms of tax do not conflict but are supplementary to one another and form a logical tax structure: so run the formidable rationalizations of the economists*. Mr. Hull not only subscribed to that view, he also sought to demonstrate that such was the place of the proposed federal estate tax in its relation to existing State taxes.

He pointed out that the greater part of estates, passing to direct heirs, escaped State taxation—in part this was because of the low rates for immediate heirs, and in part because many of the existing State taxes were levied only upon collateral relations.** And he stated that consequently a

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* Professor Seligman to the National Conference on Inheritance and Estate Taxation, Feb. 1925 (Report of Proceedings, pp. 58-60):

> "While the share tax rests upon the idea of individual obligation, the estate tax rests upon the idea of social obligation. In the share tax we think of the duty of the recipient; in the estate tax we think of the relation of the estate as a whole to the society which helped to make it possible. The defence in both cases, as in that of every direct tax, is ability to pay or fiscal capacity. But whereas in the share tax the ability is conceived of as an individual matter, in the case of the estate tax it is conceived of as a social matter. *In a well-rounded system of inheritance taxes or death duties we need both the individual and the social elements; that is, we need both the share tax and the estate tax.*"

See also Carl Plehn, Introduction to Public Finance (1921 ed.) 204; Seligman, Reducing Inheritance Tax Difficulties, 3 Nat. Inc. Tax. Mag. 145.

The estate tax operates on the "back tax" theory, *i.e.*, to reach into the estate for taxes which the deceased should have paid in his lifetime. West, The Inheritance Tax, page 205; Seligman, Essays in Taxation (1925), page 136. The inheritance tax on the other hand looks to the recipients of the shares. It measures the tax on a *quid pro quo* basis, *i.e.*, by the benefit to the legatees rather than by the size of the estate. Schultz, Inheritance Taxation, p. 216 *et seq.*

** "In pursuit of exact equity under State share tax laws the estate is divided and subdivided, and often again subdivided, until the shares become so small that even very high rates afford but comparatively small and disappointing revenues"

* * * * * *

"Experience teaches us that three-fourths of the value of real estate passing by death goes to direct heirs. The reason the States get very little revenue from their inheritance laws which impose a tax chiefly on collaterals is obvious" (p. 10657).

federal tax which would fall upon the estate itself would not be in conflict with the States' taxes (p. 10657):

> "The effect of the rates carried in the pending estate tax bill when considered as a supplement to our State taxes on shares of estates will not be unjust or unreasonable; on the contrary, the State laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation."

The assumption underlying is of course that the federal estate tax would not be apportioned. Mr. Hull went on to make it explicit. He first described the incidence of the proposed tax in a case of intestacy:

> "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it."

And then:

> "Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can

> insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." (p. 10657).

This cannot with reason be read to mean that the incidence of the proposed estate tax is to be governed by State law. Mr. Hull described the incidence of the tax as 'fastening' upon "the entire net estate before distribution"—whether in intestacy or where there was a will. If the testator should not find "this equitable method" suitable—the method of "imposing it upon the entire net estate before distribution"—he would then be free to change "the incidence of the tax."

Plainly Mr. Hull conceived of the simultaneous and harmonious operation of the federal estate and the State share taxes. Indeed he criticized his proposed estate tax because it "is not within itself a comprehensive bill"—since "an estate tax in this country should carry suitable rates and should be combined with a well balanced system of share taxes when viewed as a permanent measure." He envisioned the ultimate collection of all death taxes by the national government with a distribution of some of the proceeds to the States, as is the practice abroad:

> "I have prepared for discussion and consideration a measure designed to accomplish this result. I contemplate formally introducing it at a later date." *

Mr. Hull's meaning is illuminated by reference to the printed Senate research document from which he obviously drew heavily; his statement is in many respects a colloquial restatement of its text (Sen. Rep. 114, 61st Cong., 1st Sess.)—see Appendix 3.

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* The House Committee seems to have entertained a "tentative plan" for such a system in 1916. See 53 Cong. Rec. app. 1403, Rep. Curry.

His subsequent statement in 1925 of the theory of this first federal estate tax, made to the Conference of Inheritance Tax Commissioners, further clarifies his views.*

The Statements of the Congressional Committees.

Mr. Hull was not alone in this conception. It permeates the identical report of the House and Senate Committees in charge of the bill:

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> " 'The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various States, and the same can be readily administered with less conflict than a tax based upon the shares' " (House Rep. #922, Committee on Ways and Means, 64th Cong., 1st Sess., p. 5; C. B. 1939-1, Pt. 2, p. 25).
>
> (See also 53 Cong. Rec. 10596 and app. 1495.)

The Chairman of the House Committee expressed the same thought (53 Cong. Rec. app. 1942):

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* "It was decided therefore that a moderate estate tax, with a rate not to exceed a maximum of ten per cent., when supplemented by the collateral rates imposed by the states, would really make a somewhat logical inheritance tax structure at that time, and I think it did" (Proceedings of Conference, p. 105).

Mr. Blakey had noted in 1916 the diminished opposition to the *estate* tax on the part of the States. "The New Revenue Act," 6 Amer. Ec. Rev. 844.

"Mr. Cox: Does the gentleman recall how his tax rates compare with the inheritance tax rates in the State of New York?

Mr. Kitchen: No; I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."*

The estate tax is simple and economical to administer, but that observation was hardly the entire point of Mr. Kitchen's remarks (*cf.* R. 76).

The opposition expressed in behalf of the States, to which petitioner makes full reference (pp. 29-30), could hardly have been forestalled, by proposing a tax which would merely be a more easily administered tax. The Committee reports advance this consideration as an *additional* reason why the federal tax should be adopted as an estate tax.

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* Mr. Dixon, another Committee member, also voiced the conception that no conflict could arise (53 Cong. Rec. 10596):

"To-day there are 42 States imposing taxes upon inheritance, 30 of them provide for taxes upon both direct and collateral heirs; 12 limit the taxes to collateral heirs. This bill provides for a tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees, devisees, and legatees. Its administrative features are simple. I appreciate the argument that this tax might properly be left entirely to the States and have some sympathy with that proposition, but with its large exemption, of $50,000 and its reasonable rates there will be little reason to complain of this law."

Prof. Schultz has made the same point with respect to the Federal exemption (Inheritance Taxation, p. 337).

We do not find in the Record "the discussions on the floor" which it is claimed "abundantly" demonstrate that the difficulties of administering a federal share tax were "in fact the fundamental reason for proposing an estate tax" (pet. br. p. 31). The Committee report quoted was written in 1933.

Confirmation of the Congressional intention as to the incidence of its tax will also be found in the draft of the bill as originally introduced and in the text as finally adopted.

The Original Draft of the Federal Estate Tax.

The bill as first introduced made no express provision for adjusting the incidence of the tax. But that omission could be supplied "in the revealing light of the forms that were rejected" (*Hopkins Savings Ass'n* v. *Cleary*, 296 U. S. 315, 334).

Every previous federal death tax had made provision for the payment of the tax by the legatees and had afforded means by which the executor might have reimbursement for the tax from the legatees (30 Stat. 448, 464-6 (June 1898) as amended 31 Stat. 946 at 949 (1901); 13 Stat. 223, 285-7, 287-9 (July 1864); 12 Stat. 432, 485-6 (July 1862); 1 Stat. 527 (1797)). The bills for a federal share tax which had been offered in 1909 and 1913 also contained such provisions (44 Cong. Rec. 4279; 50 Cong. Rec. 4422 *et seq.*).

So far as its administrative provisions were concerned (secs. 205 *et seq.* of the 1916 Act), the proposed estate tax law closely paralleled both the provisions and the structure of the earlier federal death tax laws:—the return; the ascertainment of the amount of the tax; its payment and the receipt therefor to the executor, conclusive as to the fact of payment in any judicial proceeding;—down to and including the clause authorizing the Collector to obtain the tax from any person having any property of the estate. But

where each of the earlier Acts *then* made specific provision placing the incidence of the tax upon the legatees (*i.e.*, 31 Stat. at 949), the proposed estate tax was silent.

The proposed federal tax also reflected careful study of the English law—but did not follow that law insofar as it explicitly apportioned the estate tax attributable to property not passing to the executor (Finance Act of 1894, 57 & 58 Vict. c. 30 §§6(2), 9(4) and 14(1). The Senate document which was at hand (see Appendix 3) explained, and the authorities interpreting the English law confirm, that the incidence of the English estate tax, when not expressly apportioned, falls upon the residuary estate (*In re Bourne*, (1893) 1 Ch. 188; *In re Avery*, (1913) 1 Ch. 208).

Constitutional considerations. The background of constitutional doctrine is also relevant. When the estate tax was adopted in 1916 its permissible incidence was firmly fixed by the decision in *Knowlton* v. *Moore*, 178 U. S. 41, in which this Court had warned against a death tax measured by the entire estate and imposed upon the legacies or distributive shares. "It may be doubted," wrote Mr. Justice White:

> "aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems" (p. 77; and see also p. 109).

(See also *Matter of Sherman*, 179 App. Div. 497, 500 aff'd 222 N. Y. 540; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 370).

It is clear why Congress, in the face of this ruling, should have desired that its estate tax should not fall upon the legatees.*

Indeed the constitutionality of the estate tax was soon after sustained, against the challenge based upon *Knowlton* v. *Moore*, because it does not fall upon the shares (*New York Trust Co.* v. *Eisner*, 263 Fed. 620 at 621 *per* Judge Mack, aff'd 256 U. S. 345):

> "The doubt as to validity expressed in that case * * * did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax,—to measure it by the value of the net estate and to cast the burden upon the residuary personal estate."

Nevertheless question as to the incidence of the tax was raised in the House. A comparison was made with the provisions of the preceding death tax, the legacy tax of 1898 (30 Stat. at 464-6, secs. 30 *et seq.* as amended in 1901, 31 Stat. 946 at 949). In that law, it was pointed out, there was a provision that any tax paid "shall be deducted from the particular legacy or distributive share on account of which

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* *Matter of Hamlin*, 226 N. Y. 407 at 413:

> "In 1916, when the Congress was again confronted with the necessity of providing revenue, we may assume that the framers of a proposed law would in the first instance recall the law of 1898, and the decision of the United States Supreme Court in the *Knowlton* Case, to the end that any proposed legislation should be within constitutional limitations and consonant with the decision of the court."

Probably this constitutional doctrine of *Knowlton* v. *Moore* is not now law (*Stebbins* v. *Riley*, 268 U. S. 137; *Matter of Vanderbilt*, 251 N. Y. 297 at 315, aff'd sub. nom.; *Whitney* v. *State Tax Commission*, 309 U. S. 530 at 540). But "it is quite inadmissible to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine" (*Burnet* v. *Brooks*, 288 U. S. 378 at 389).

the same is charged". The proposed estate tax was criticized in that it failed to make similar provision.*

But the Senate inserted the appropriate provision at the point indicated (53 Cong. Rec. 13299, accepted by the House at 14112). Its purpose is clearly to state the intention to fix the incidence of the tax upon the estate (Revenue Act of 1916, sec. 208; now I. R. C. sec. 826-b). Indeed the amendment employs the words of Mr. Hull that the tax be paid "out of the estate before its distribution" (p. 14, *supra*)—words which were in turn borrowed from the earlier Senate research document describing the incidence of the English estate tax which is not apportioned among the legatees (Appendix 3).

Internal Revenue Code Sec. 826-b.

The section follows immediately the authorization to the Collector to collect the tax from any possible source (sec. 826-a). It reads:

> "Sec. 826-b. *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such,

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* "If he (the executor) pays the tax no provision is made for a charge against the beneficiaries. How is he to settle the rights between numerous beneficiaries where the tax is increased in proportion to the value of the estate?

* * * * *

* "It seems to me that the framers of this bill have overlooked all the congressional acts heretofore passed imposing a tax upon the right of succession to property and have overlooked the fact that the tax must rest against the legatee or heir who received the distributive share of the estate. The tax not being levied on the succession to property of the decedent but on the property itself becomes a direct tax etc. * * *" (Rep. Dillon 53 Cong. Rec. App. 1495-6.)

such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this sub-chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

If the Collector procures the tax out of property of the estate held by any legatee, that legatee is entitled to reimbursement from the estate. This alone discloses the Congressional intent, for the direction is for "reimbursement" and not "contribution"—a distinction of which, the statute itself shows, the draftsmen were quite aware. And the provision commands reimbursement if the legatee pay "any part" of the tax—whether that be more or less than what might be deemed his *pro rata*.

The succeeding clause, contemplating "contribution" from those persons whose interest "would have been reduced if the tax had been paid before the distribution of the estate" or "is subject to equal or prior liability", does not disturb the sense of the foregoing direction. The persons described are the ones who share the residuary estate. The provision contemplates that the tax shall fall upon them as do "other charges against the estate"—and such charges were not known to fall elsewhere than on the residuary estate. It predicates that "a prior liability" for the tax may exist; and if the tax were apportioned there could not be any such prior liability. The different State courts have concluded upon careful analysis that this clause reinforces and does

not disturb the preceding direction intended to place the burden of the tax upon the estate when the tax should happen first to fall upon the shares. (*Matter of Hamlin*, 226 N. Y. 407; *Farmers' L. & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 495; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 367 *et seq.*; *People* v. *Pasfield*, 284 Ill. 450 at 453-4.)

The final clause, the declaration of the intent of Congress that (unless the testator otherwise direct) the tax should be paid "out of the estate before its distribution," itself seems conclusive. It is the very language of Mr. Hull explaining the incidence of the tax, its real nature as he designed it. (p. 14 *et seq.*, *supra;* see also Holmes, *J.* in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349-50).

The testator is permitted to direct "otherwise". No one will deny—and even petitioner assumes (br., p. 51, Point IV heading)—that the choice thus offered the testator is whether the tax should be apportioned among his beneficiaries and not merely whether payment of the tax is to be postponed.

The executor must pay the tax under any system of death taxation (*i.e.*, 30 Stat. 448, 465; or former N. Y. Tax Law §224).; a direction merely to pay the tax before distributing would be an idle caution. This provision has the different purpose of declaring that the tax is not to be distributed among the shares. In the same sense a share tax is payable *after* the estate is "distributed" among the beneficiaries. (And compare the proposed new sec. 826-d—Appendix 7.)

Petitioner's analysis of the provision leads him nevertheless to the conclusion that "the burden of the tax is left to be distributed pursuant to applicable state law" (br., p. 37). Even the dissenting opinion in the Court below recognized in this provision "the command of the federal estate tax that, unless otherwise directed by the will, the tax be paid out of the net estate * * *" (R. 76 and 79). Con-

temporary interpretation by the Treasury went even further and fully agreed with our analysis.*

It is argued that section 826-b if so read is meaningless where there is no residuary estate or where under State law the tax falls upon the residuary personalty rather than upon the residuary realty (pet. br., pp. 36-7; R. 78). The contention depends upon an erroneous presupposition already criticized: the primary purpose of Congress was to prevent its tax from falling upon the shares; and Congress intended the tax to fall upon the residue only in the sense in which any inevitable consequence is intended (pp. 10-11, *supra*). Congress seems indeed to have recognized that not all testators leave residuary estates—that is why it provided in 826-b that the tax should fall upon the estate "so far as is practicable".

On the evidence the conclusion must be that Congress, far from being indifferent as to the incidence of its estate tax, conclusively fixed its incidence. And the subsequent legislative history of the estate tax law considered *infra*, confirms that conclusion (see pp. 33-34, *infra*).

Internal Revenue Code Sec. 812-d.

Petitioner maintains that a different Congressional intention was established in 1924 by an amendment of the

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* Reg. 37, Art. XXXVII, revised May 1917:

"The provision in the last sentence of section 208 (now I. R. C. secs. 826-a and 826-b) merely recognizes the essential fact that this is not an inheritance, but an estate tax. It is levied upon the whole net estate and is payable therefrom by the executor before distribution to and without regard to its effect on the several inheritors. In the event, therefore, that in the collection of the tax the Government has proceeded against that part of the estate which has come into the possession of an individual beneficiary, the law provides an adjustment of the tax among the several beneficiaries in such a manner as to restore the condition that would have existed had the tax been paid when due as a tax upon, and payable out of, the whole net estate." (Matter in parentheses ours.)

law which limited the extent of the deduction for charitable bequests (I. R. C. sec. 812-d).

Two different problems concerning deductions for charities provoked that amendment. Neither had anything to do with the question of the power of the States to alter the incidence of the federal estate tax. The first involved State legacy taxes. The Courts had held that the face amount of a general bequest to charity was deductible in computing the federal net estate even though the charity paid a State tax (*Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419; *Estate of Amy Lowell*, 20 B. T. A. 440 and cases cited; *Matter of Colonial Trust Co.*, 19 B. T. A. 174). The second involved the federal estate tax. On February 18, 1924, this Court had permitted a deduction for the entire residuary gift to charity without requiring that allowance be made for the federal taxes which heavily reduced the bequest (*Edwards* v. *Slocum*, 264 U. S. 613. The problem arose only where the *residuary* bequest was to charity, since the federal tax fell only upon the residuary estate.

Congress promptly wrote the opposite rule into the law (Revenue Act of 1924, sec. 303 (b) (3). Plainly the setting did not imply a "recognition" that the federal tax might fall, by State command or otherwise, elsewhere than upon the residuary estate. Congress had only one purpose: to limit the deduction allowed for charity to the amount actually received by charity.

The contemporary Committee reports (see Appendix 4) will be searched in vain for suggestion of a recognition of or acquiescence in the power of any State with respect to the incidence of the federal tax; or to adopt the dictum by Judge Hough in the opinion below in *Edwards* v. *Slocum;* or to recognize what Mr. Solicitor General James M. Beck in that case thought it unnecessary to dispute for purposes of his argument.* At most Congress could not in this setting be

* The Committee report to which petitioner refers was made in 1932 (pp. 45-6).

deemed to have recognized any fact other than its own dominating purpose to require allowance to be made in computing the charitable deduction for taxes of *whatever* nature levied, and by *whatever* authority.

The amendment itself would meet the situation which gave rise to it, first, by excluding the State legacy taxes from the deduction allowed for any general bequest to charity, and second, by making similar provision for the federal estate tax as well where the charitable bequest is in the residue.

Consequently whether, as petitioner argues (br. p. 44) the amendment "recognized in express terms" any power in the States to dictate the incidence of the federal tax depends first of all upon how its words are parsed. Canons of grammatical construction do not determine whether its phrase: "by the law of the jurisdiction under which the estate is administered" in truth refers to "the tax imposed by section 810," or simply to the different taxes which the States may impose ("estate, succession, legacy, or inheritance taxes"). But it ought to be significant that the provision is found in most death tax laws, including the New York law (Tax Law, sec. 249-s(3)), and in that setting it does not imply a recognition of the competency of "the law of the jurisdiction under which the estate is administered" to change the incidence of the New York tax. The elaborate analyses in the tax services of this provision of the federal law do not intimate the purpose now claimed for it. (C. C. H. Federal Tax Service 1942, Vol. 3, Pars. 23, 401-23, 407; Alexander Tax Service, Vol. 1, Par. 4108.)

The provision, now sec. 812-d, was not adopted until 1924. In 1926 it was retroactively repealed (Revenue Act of 1926, sec. 323), and it did not again find its place in the law until 1932 (45 Stat. 282; I. R. C. 303(a) (3), 303(b) (3)). Petitioner's argument is in effect that it repealed sec. 826-b by implication, or rather by "recognition".

The Authorities.

Its circumstances, as well as the facts we have reviewed, explain the unreliability of Judge Hough's dictum that Congress was indifferent as to the incidence of its estate tax and left the "state courts" to settle it as they pleased (*Edwards* v. *Slocum*, 287 Fed. 651, 653, aff'd 264 U. S. 61).

No person who had an interest in the question of apportionment was before Judge Hough: none of the legatees were parties—only the executor and the Collector. The question was not suggested, much less argued, in the briefs submitted to Judge Hough. There was no examination by anyone of the evidence on the intent of Congress. Nor was the dictum uttered after consideration, it was merely assumed *arguendo*, in order to establish a different point. Both in the opinion below by Judge Augustus Hand, and in the opinion of Mr. Justice Holmes, the same holding was reached without reliance on this ground.

It is true that the dictum has had currency. The New York State Commission responsible for sec. 124 relied upon it; its influence is apparent in a Treasury regulation of 1925 and a Senate report in 1932 (pet. br., pp. 45-6); and a number of the State Courts have adopted its thought (pet. br., p. 47). They are however only by way of dicta: there is apparently no decision which apportions the federal tax among all legatees under a will.

These dicta cannot survive contrast with the opinions, particularly in New York and Massachusetts, which hold that the federal estate tax is not to be apportioned. These opinions do not rely merely upon the mechanical incidence of *any* estate tax, they reflect painstaking study of the evidence as to the intent of Congress and their conclusion rests upon a finding as to Congressional intent.

Perhaps the most emphatic of them was written by Judge Cardozo in *Matter of Oakes*, 248 N. Y. 280. He there ob-

served that "The Federal tax * * * is laid upon the transfer of the estate as a whole, and, primarily at least*, is a charge upon the residue". Then this was reenforced by this reference to sec. 826(b):

> "The command of the statute is explicit as to the incidence of the burden (the opinion quoted sec. 826-b). The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been modified by the will * * *." (p. 283).

An elaborate analysis of the Act and the intention of Congress will be found in *Matter of Hamlin*, 226 N. Y. 407, cert. den. 250 U. S. 672; *cf. Winthrop v. Farmers' Loan and Trust Company*, 238 N. Y. 488, cert. den. 266 U. S. 633. (see also *Plunkett v. Old Colony Trust Company*, 233 Mass. 471; *Bemis* v. *Converse*, 246 Mass. 131; *In re Newton's Estate*, 74 Pa. Super. Ct. 361; and *People* v. *Passfield*, 284 Ill. 450).

These decisions presuppose that the meaning of this federal law is a federal question, not amenable to diverse answer by the different States. They acknowledge a federal command which they are bound to follow (p. 5, *supra*). Petitioner incorrectly suggests (p. 47) that they "appear to have been decided on reasoning unnecessary for the decision", or that their correctness may somehow be explained by the date of death of the decedent.

The observation of Mr. Justice Taft in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, at page 50, does not go so far as is claimed. The law does not exempt any specific $50,000 from the tax; his very point was that the tax does not fall upon the interest of any particular legatee. The decision holds that the tax must be borne by the residue and not by the shares and

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* *i.e.*, in the absence of contrary direction in the will and not, as suggested in the dissenting opinion below (R. 78), in the absence of State regulation.

in the course of his opinion Mr. Justice Taft made reference to sec. 826(b) (p. 50).

Section 826-b Today.

We face the seeming paradox involved in invalidating Decedent Estate Law sec. 124. Congress desired to avoid conflict with the States (and acted moreover in the light of State taxing systems, many of which have changed). Yet the expression of that purpose leads to rejection of the present State statute. The obvious answer would seem to be that Congress if and when it should find itself in agreement with the New York strictures on the equities of its existing command as to the incidence of its tax (but compare pp. 33-35, *infra*), is thereupon free to revoke that command.

But there are other answers. The provision directing the tax upon the estate rather than the shares still serves a necessary federal purpose: it preserves for the perhaps immediate future a source of federal revenue—the legacy tax. In 1935 Congress came near to adopting such a legacy tax in addition to the estate tax. The proposal was urgently made by the President and was adopted by the House, but was eliminated in conference committee (H. R. #1681, 74 Cong., 1st Sess., p. 2—Cum. Bull. 1939-1, Pt. 2, pp. 643, 648; Conf. Rep. #1885, p. 10, amd't #17—Cum. Bull. 1939-1, Pt. 2, p. 663; see also the testimony by the then Attorney General, Mr. Justice Jackson, reprinted in Studenski, Taxation and Public Policy, pp. 212 *et seq.*, 221). Present needs suggest its revival. Many sovereignties levy both such death taxes and economic theory justifies the simultaneous imposition of both (pp. 12-13, *supra*).

It is of the essence—in an intensely practical way—that the one should fall upon the estate without distribution and that the other should fall only upon the legatees. The proposed rates, for example, quickly mounted to 50%, and

reached a maximum of 75%. If the States will have successfully converted the federal estate tax (which may also exceed 50%) into a tax necessarily at the same high rate on the legacies, the combined taxes may exceed the legacies—a result which cannot follow under a federally designed system which must afford appropriate credit against the legacy tax.

It is no answer to suppose that the State apportionment laws would be superseded by such federal legislation. The existence of such State laws would itself be an effective practical impediment to the adoption of a federal legacy tax superimposed upon the estate tax.

The proposal has also been made, and is familiar, that the national government levy all estate and all share taxes and divide the proceeds with the States. Mr. Hull said he had it in mind when he drew the original law (p. 15, *supra*). But here too the field would not be open for Congressional action if the States have succeeded in changing the incidence of the federal tax. Such a comprehensive federal scheme would not be feasible in the light of such interference.

It is in any event a dangerous proposition that the States should be free to override the dictated incidence of a federal tax because the Congressional purpose in fixing that incidence may at a later time appear questionable. But it so happens that sec. 826-b also serves the wider purpose of preserving the freedom of federal action—a fortunate circumstance in the light of present day realities.

The Result of Section 826-b.

Since Congress adopted sec. 826-b to express the underlying purpose that its estate tax should not fall upon the shares, it follows that New York Decedent Estate Law, sec. 124 which seeks to accomplish that result is invalid. The whole point of *Hines* v. *Davidowitz*, 312 U. S. 52 and many

other authorities under the Supremacy Clause, is that it is not necessary that Congress declare in express terms its purpose to exclude action by the States, but that its purpose, gathered upon examination of the evidence, will govern.

The dissenting opinion in the Court of Appeals concedes that sec. 826-b constitutes a "command" that "the tax be paid out of the net estate" (R. 76, 79), but argues that New York may place the tax elsewhere because Congress was nevertheless indifferent as to the incidence of the tax. Granting the error of fact, we should have supposed that it was unnecessary for Congress, in stating what it did desire, to state specifically that it did not desire State legislation to the contrary. There is no principle denying federal supremacy unless Congress expressly exclude the States from the field (compare *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44; *Flaherty* v. *Hanson,* 215 U. S. 515; *Western Union Tel. Co.* v. *Boegli,* 251 U. S. 315; *N. Y. Central R. R. Co.* v. *Winfield,* 244 U. S. 147; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; and cases cited, p. 37, *infra*).

It should be noted that the petitioner seems to prefer to stand on the different and extreme ground that sec. 826-b actually authorizes the burden of its tax to be distributed pursuant to State law.

However, we shall consider this case upon an assumption like Judge Desmond's as to the purpose and meaning of section 826-b (Point III, *infra*).

POINT II.

New York Decedent Estate Law sec. 124 is in conflict with the Federal Estate Tax.

In one situation the effect of apportioning the federal tax as required by Decedent Estate Law sec. 124 is sub-

stantially to reduce the amount of the federal estate tax otherwise payable.

The federal law limits the deduction from the gross estate for charitable bequests to the amount actually received by the charity (see pp. 24-26, *supra*). Where a charity is the residuary legatee, the result of apportioning the federal tax under sec. 124 is to enhance the residuary estate. This increases the charitable deduction, and reduces the net taxable estate and so the ensuing federal tax (*cf. Commissioner* v. *Thompson*, 123 F. (2d) 816 at 818).

This collision is by no means *de minimis*. In a New York estate of $1,000,000 where the residue is left to charity after general legacies of $500,000, if the federal tax falls normally upon the residue the federal government will receive $181,538. If the tax is apportioned under sec. 124, the tax payable is $147,218—a decrease of approximately 19%. If the net estate is $5,000,000, of which half is left in general bequests to individuals and the residue to charity, the federal tax upon the estate under sec. 826-b is $1,793,630. Apportion the tax and the federal return is $1,153,612—a difference of $640,000, approximately 35%.

The percentage of difference is even more appreciable on larger estates, as the rate reaches the higher brackets.

Upon these facts, *United States* v. *Snyder*, 149 U. S. 210, and *Flaherty* v. *Hanson*, 215 U. S. 515, are ample authority for rejecting sec. 124.

Petitioner claims that the federal statute, sec. 812-d, "itself directs" that allowance be made for "the burden of the tax as determined by state law" (p. 15 footnote, see also p. 46). Petitioner did not make so wide a claim when examining the exact words of the statute; then it was argued only that it "recognized" the controlling effect of State law.

We have discussed the statute (pp. 24-26, *supra*): it carries no implication, much less any authorization, as to the State power to adjust the incidence of the federal tax.

Its aim was to put an end to a method of avoiding the estate tax, to augment rather than diminish the federal revenue from the tax. In the light of its flickering existence before 1932 (p. 26, *supra*), it could have afforded singularly intermittent direction opening the field for State action. A more positive declaration of the alleged Congressional intent to authorize such substantial reduction in the federal revenue would seem appropriate.

POINT III.

Congress by legislative action, subsequent to sec. 826-b, preempted the field which in any event is not open to the States without Congressional consent.

We shall here assume that Congress did not in sec. 826-b declare its intention to adopt an estate tax, the burden of which is not to be distributed as a legacy tax is distributed. Still there has since 1916 been significant Congressional action, overlooked in the dissenting opinion below. There has been intermittent pressure upon Congress, upon alleged equitable considerations, to direct apportionment of the tax. Congress has yielded to that pressure to a limited extent but it has declined to do so to the extent dictated by Decedent Estate Law sec. 124.

Congressional action after 1916. The first occasion arose in 1918. The Senate voted to substitute an inheritance or legacy tax for the estate tax. The report of the Senate Finance Committee urged the change on the ground that the incidence of the estate tax was inequitable (Sen. Rep. 617, p. 15, 65th Cong., 3rd Sess.; Cum. Bull. 1939-1, Pt. 2, p. 127). Contemporary evidence confirms the Senate's preoccupation with the equities of the incidence of the estate tax (see Appendix 6). The proposal failed in Conference (H. R. 1037, pp. 171-3; Cum. Bull. 1939-1, Pt. 2, p. 151). But the different House proposal (described by the House

Committee as one of those "insuring more *equitable*, uniform and efficient administration of the law") was adopted. It directs that the tax be apportioned to the beneficiaries in so far as attributable to the proceeds of insurance paid to those beneficiaries (H. R. 767, p. 22 *et seq;* Cum. Bull. 1939-1, p. 102). It is now sec. 826-c of the estate tax law (see Appendix 1). It provides a scheme of reimbursement among beneficiaries directly contrary to sec. 826-b. As Chief Justice Rugg said in *Bemis* v. *Converse*, 246 Mass. 131 at 134, "the presence of this provision indicates that no further apportionment was intended by Congress".

In 1921 the demand for substitution of a legacy tax was renewed but was again unsuccessful (61 Cong. Rec. 6922, 5839-40).

Again in 1924 an effort to substitute a legacy tax was made—this time on the floor of the Senate (65 Cong. Rec. 8034 *et seq.*, 8037). One of the reasons stated for the proposed substitution was, again, that the incidence of the federal estate tax upon the residuary was unfair (65 Cong. Rec. 8039, Senator Walsh of Massachusetts). The Senate adopted the proposal, but in conference the House views prevailed (65 Cong. Rec. 9536; Cum. Bull. 1939-1, Pt. 2, p. 308, amdt. 122).

There was further action in Congress following the decision of the Court of Appeals in the present case. Mr. Randolph Paul, then Tax Adviser to the Secretary of the Treasury, officially proposed that Congress devise its own formula of apportionment (Statement to the House Ways and Means Committee, Wall Street Journal, March 5, 1942, p. 16, column 4). Another proposal, in the House, was to authorize the States to apportion the tax (H. R. 6257). But neither suggestion has been adopted.

The pending Revenue Bill proposes only the apportionment of the tax attributable to property passing under a power of appointment (proposed Revenue Act of 1942, sec.

403, adding new I. R. C. sec. 826-d). Its text, as well as the House Committee report, is in Appendix 7. Again, the stated motive was to achieve "fair and equitable" apportionment of the tax burden. At the present writing the proposal has been endorsed by the Senate Committee and is before the Senate for consideration. Whatever the outcome, this much seems clear: on several occasions since adoption of the estate tax Congress has been urged on equitable grounds to reconsider the incidence of the tax, has taken the question under consideration, and has declined to shift its incidence from the estate itself except in two narrow instances. And those exceptions, involving the tax on insurance and on property subject to a power, are the situations in which the property is deemed part of the testator's estate only by an artificial concept.

In these circumstances the decisions of this Court establish that there is no room for State action: that even if the incidence of its tax were not originally one exclusively for the concern of Congress, Congress has in fact occupied the field. In any event the States are not free unless with Congressional consent to enact supplementary (much less contradictory or interfering) legislation in this field.

Congress is in the field. The governing principle was stated many years ago in *Prigg* v. *Pennsylvania*, 16 Pet. 539, where there was involved the constitutionality of a Pennsylvania law governing the recapture of fugitive slaves. There was (as we also assume here) no actual conflict with the federal legislation on the same subject. Mr. Justice Story observed, however, that the federal act "may truly be said to cover the whole ground * * * not because it exhausts the remedies which may be applied by Congress * * * but because it points out fully all the modes of obtaining those objects, which Congress in their discretion have

as yet deemed expedient or proper to meet the exigencies of the Constitution * * *" He continued:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed" (pp. 617-8).

The recent decision in *Hines* v. *Davidowitz*, 312 U. S. 52, applies the principle in circumstances peculiarly apposite here. The decision moreover corroborates this general presumption through examination of the available evidence as to the intention of Congress.

The question was whether the Federal Alien Registration law superseded the Pennsylvania statute which set up a system of registering aliens which required them to carry identification cards to be produced upon demand. The field was one, it was pointed out, in which concurrent State power if it exists is narrowly restricted, especially where Congress had enacted an integrated system apparently covering the field. Congress had in the past consistently declined to adopt an alien registration law which made provision for the carrying of identification cards, and this Court con-

cluded upon the evidence that Congress had intended that there should be no such legislation which so invaded personal liberties. It was not necessary for Congress to have excluded the States from the field by express words. The States were not free to act where Congress had deliberately avoided acting:

> "* * * the States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" (pp. 66-7).

Many decisions under the commerce clause carry the same point: given the fact that in 1916 Congress stated its intention as to the incidence of its tax and in subsequent years made some adjustments in the incidence of the tax while at the same time refusing completely to reverse the incidence,—they would draw the conclusion that the States are ousted from the field.* But it is not necessary to rely upon those decisions, which turn upon preconceptions supporting State action in the field which are inapplicable here (*cf. Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 392-3). In the present case there is involved, in the federal estate tax, a comprehensive and integrated federal system,

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* *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *N. Y. Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87; *Missouri Pacific* v. *Porter*, 273 U. S. 341; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; *Postal Tel. Cable Co.* v. *Warren-Godwin*, 251 U. S. 27; *Kansas City So. Ry.* v. *Van Zant*, 260 U. S. 459; *cf. New Orleans N. E. R. R. Co.* v. *Harris*, 247 U. S. 367; *C. & O. Co.* v. *Stapleton*, 279 U. S. 587; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59. These decisions are *a fortiori*, since where invasion by a state of the federal commerce power is claimed, the principle applied if the commerce is of local concern only is that Congress must affirmatively be shown to have occupied the field (see p. 39, *infra*).

a complete scheme of regulation, and the States may legislate upon any of its aspects only if Congress permits.

The federal estate tax is a complete and independent tax system. Every detail necessary to make the federal estate tax a complete and independent revenue system finds expression in the law:—the separate tax return; the independent determination of the property subject to tax and the value of that property; the independent mechanism for the levy, the enforcement, and the collection of the tax in the federal courts (I. R. C. secs. 821 *et seq.*); and, we submit, the provision fixing its incidence upon the estate except to the extent that Congress has seen fit to apportion it (sec. 826-b, 826-c, and the pending 826-d). It is nationwide in application and it functions fully without assistance from any of the States.

It would indeed be subject to State control if the State power to tax inheritance were "complete", which presumably means paramount (R. 80). But the estate tax rests upon independent federal power (*Knowlton* v. *Moore*, 178 U. S. at 56). It is "given in terms as absolute as language affords" (*United States* v. *Snyder*, 141 U. S. 210 at p. 214). One of the truisms of constitutional law is that the taxing powers of State and federal government are concurrent and mutually independent (The Federalist No. 32; Story, Commentaries on the Constitution (5th ed. 1905), vol. 2, sec. 1068; vol. 1, sec. 940; *Knowlton* v. *Moore*, 178 U. S. 41 at 60; *United States* v. *Bennett*, 232 U. S. 299 at 306). And where conflict with the State taxing power does arise, it is the federal power which is superior (*cf. United States* v. *Texas*, 314 U. S. 480; *Frick* v. *Pennsylvania*, 268 U. S. 473 at 479; *Lane County* v. *Oregon*, 7 Wall. 71).

The authorities closely limit the power of the States with respect to such a system created under such a power. There must be distinguished the approach to questions of State

power to legislate concerning commerce which is only of local concern because peculiarly adapted to local regulation: necessarily considerations of national uniformity do not enter in such case. Federal and State power are then "concurrent," and the States may act until Congress moves affirmatively to occupy the field (*Cooley* v. *Board of Wardens*, 12 How. 299 at 319-20; *The Minnesota Rate Cases*, 230 U. S. 352, 399; *California* v. *Thompson*, 313 U. S. 109, 113, 116). But the federal power to tax at death when exercised in a comprehensive and self sufficient system is inconsistent with action by the States, which may then act concurrently only when Congress consents.

Only Congressional permission will authorize the States to change the incidence of the federal tax. This principle in its relation to the federal revenue system was clearly stated in *Burnet* v. *Harmel*, 287 U. S. 103.

The question in the case was whether State law would be permitted to determine whether or not certain payments made to a taxpayer were income. This Court ruled (p. 110):

> "Here we are concerned only with the * * * exercise of its plenary power (of Congress) under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

These principles—the most recent formulations of them are even more emphatic (*United States* v. *Pelzer*, 312 U. S. 399, 402-3; *New York* v. *Feiring*, 313 U. S. 283, 285)—are applicable to the estate tax (*Lyeth* v. *Hoey*, 305 U. S. 188 at 193).

They would seem to deny to the States the power to change the incidence of this federal tax even if Congress had been entirely silent on that subject. Of course the inference to be drawn from the silence of Congress depends upon "the nature of the congressional power" in question (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 at 479). But so far as the power underlying the estate tax or any integrated and comprehensive federal system is concerned, the principle which must be applicable is that the silence of Congress is not assent to State action. This must be so: for where Congress has established such a system, the States should be free, neither to interfere with nor to supplement its operation, without clear evidence that Congress intended to authorize such action.

The decisions involving other similarly constituted federal systems entirely support this generalization. In emphatic language stressing the necessity for congressional consent, the States have been consistently denied the power to regulate the operations of the federal banking system (*Farmers & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 34; *Easton* v. *Iowa*, 188 U. S. 220; *First Nat'l Bank* v. *California*, 262 N. Y. 366; *cf. Hopkins Savings Ass'n* v. *Cleary*, 296 U. S. 315). The opinions stress the need for preserving the nationwide uniformity of the system: the objection to State action is that it,

> "if permitted to be applicable, might impose limitation and restrictions as various and as numerous as the States" (*Easton* v. *Iowa*, at p. 229).

On the same grounds, local law—legislative or judicial—has been outlawed which affects the uniform and independent operation of the federal bankruptcy system (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265; *Kalb* v. *Feuerstein*, 308 U. S. 433 at 439; *City of New York* v. *Feiring*, 313 U. S. 283; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 85), or the federal judicial system (see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345; *cf. B. & O. R. Co.* v. *Kepner*, 314 U. S. 44 at 53-4), or the laws of Congress upon a federal proprietary interest.* As was recently said of a provision in the Bankruptcy Law: "nothing in the language * * * or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law or the State's demand" (*New York* v. *Feiring*, 313 U. S. 283, 285). It is clear that State legislation may neither vary nor supplement the operation of a federal system established under an independent federal power, nor local judicial interpretation disrupt its uniform incidence, unless Congress assents or some "necessary implication" requires.

The necessity for uniformity. Particularly in the field of federal taxation is uniformity most earnestly commanded.**

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* *Ohio* v. *Thomas*, 173 U. S. 276 (manager of federal home for veterans not subject to State law against serving oleomargarine—*cf. Johnson* v. *Maryland*, 254 U. S. 51; *In re Leaken*, 137 Fed. 680); *Hunt* v. *United States*, 278 U. S. 96 at 100; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *cf. Superior Bath Co.* v. *McCarroll*, 312 U. S. 76 (all concerning the supervision of federal reservations or preserves); *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 at 101 and 103-4, cases cited, note 19 (other federal lands).

Similarly, State law cannot govern the terms upon which the federal government holds or enforces its claims (*United States* v. *Summerlin*, 310 U. S. 414 at 416).

** *United States* v. *Snyder*, 149 U. S. 210, 214:

"The provision (Const. Art. I, sec. 8) exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general govern-

In *United States* v. *Childs*, 266 U. S. 304, for example, the State rates of interest were held inapplicable to overdue federal taxes *because* such a construction of the law "abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation," and

> "makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the Government, 6%, in the middle West 8% and on the Pacific coast 10%" (p. 309).

But if the States may apportion the estate tax, then each State will be free to impose its own notions of what is an equitable incidence for the tax. Even so general a statute as Decedent Estate Law sec. 124, which directs that the federal tax be "equitably prorated" raises many problems. In New York the practice is to present schedules of apportionment supported by testimony (*Matter of Rappaport*, 167 Misc. 164, 167; compare *Matter of McManamy*, 172 Misc. 392; *Matter of Harjes*, 170 Misc. 431; *Matter of Kaufman*, 170 Misc. 436, at 443, *et seq.*; *Matter of Cronise*, 167 Misc. 310). Each variation may affect the amount of the federal revenue (Point II, pp. 31-33, *supra*). Apportionment does enormously complicate the computation of the tax. Even without apportionment, algebraic formulae are necessary where the residue goes to charity (C. C. H. Inheritance Tax Service (7th ed.), par. 3531.75, pp. 2552-2560). Mathematical skill of a high order is called for when in addition the tax is apportioned. And complex questions in reimbursement and contribution will arise especially if some of the apportioned shares of the tax should prove uncollectible.

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ment. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere * * *"

It is of no less importance that apportionment of the tax by the States is also inappropriate because national considerations are involved which transcend State lines. Administration of an estate may become necessary in several States. Unless all of them apportion the federal tax, and in the identical manner, the situation is confused. Only the State in which particular property happens to lie, determines its succession; that State may but is not required to bow to the law of the domicile if that is a different State (3 Beale, Conflict of Laws, secs. 465.1, 466.1; Vol. 2, secs. 245.1, 249.1, 249.2, 303.2; Restatement of Conflict of Laws, sec. 306 comment *a.*; *Frick* v. *Pennsylvania*, 268 U. S. 473, 491). In such a situation it is presumptuous for the State of the testator's domicile to undertake to regulate the incidence of the tax levied by the United States with respect to property transferred under the laws of another and third sovereignty. It would also seem that the domiciliary State would have no jurisdiction to do so. Neither could it enforce its decree against non-residents succeeding to foreign property. In respect of its incidence, the federal estate tax would no longer be "a fair and workable tax system" (*Helvering* v. *Hallock*, 309 U. S. 106, at 118, *cf. First Nat. Bank* v. *California*, 262 U. S. 366, at 370).

Neither is the State power appropriate in its application to the class of persons who naturally make their wills without relation to the State which would apportion the tax: the testator whose domicile is found to have been in a different State from that he intended; the testator who is found to have two domiciles; or the testator who changes his domicile without changing his will.

There is a true analogy under the Commerce Clause. If the subject-matter is national in character, that is if it necessitates a general system of uniform regulation affecting all the States alike, the States are not free to legislate in the field unless Congress assents (*Townsend* v. *Yeomans*, 301

U. S. 441 at 455: *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *cf. So. Pac.* v. *Jensen,* 244 U. S. 205). The silence of Congress means that State action in the field is forbidden (Biklé, The Silence of Congress, 41 Harv. L. Rev. 200).

This Court has recently declined to reverse the "historical national policy of federal non-interference with the taxing power of the States" (*Arkansas Comm'n* v. *Thompson,* 313 U. S. 132 at p. 145). That policy works both ways. The rationale of *Tarble's* case, 13 Wall. 397, in which a State was denied power to issue *habeas corpus* to question a detention under color of federal right, ought to be acceptable here (pp. 406-8):

> "There are within the territorial limits of each State two governments * * * independent of each other and supreme within their respective spheres. Each has its separate departments; each has its distinct laws; and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction or authorize any interference therein by its judicial officers with the action of the other * * *. In their laws, and modes of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, and by what officers * * * are matters subject to their own control, and in the regulation of which neither can interfere with the other."

POINT IV.

Congress has power to fix the incidence of its tax and under the supremacy clause the States must yield.

Petitioner argues that if the federal estate tax law is in conflict with the Decedent Estate Law sec. 124, then the

conflict must be resolved in favor of the State law. If Congress did fix the incidence of the tax, the argument runs, such action would be "irrelevant to its power to levy and collect taxes" (p. 16) and "without reason" (p. 23).

This, it is clear, is a contention that the authority of Congress (Const. Art. I, sec. 8) to "lay" taxes does not embrace the authority to dictate where they shall fall—a contention which strikes at the very roots of political sovereignty. This contention would render unconstitutional the provisions of the federal law which apportion the burden of the tax where Congress has deemed it equitable to do so (I. R. C. sec. 826-c, and proposed sec. 826-d), and would foreclose Congress from adopting a formula of apportionment uniformly applicable throughout the nation (see p. 34, *supra*).

Assuming that it is legitimate to question the purpose of Congress in fixing the burden of its tax (*cf. United States* v. *Darby*, 312 U. S. 100 at 115), petitioner's challenge should not go without comment. Congress had sound basis for fixing the incidence upon the estate (p. 10 *et seq.*, *supra*). Its command serves today to keep intact a future source of federal revenue (p. 29, *supra*). If Congress should desire to break up the great accumulations of capital in residuary estates which are often left to charitable "foundations" as a means of perpetuating economic control, it would direct that its estate tax fall only upon the residue of estates (*cf. Sonzinsky* v. *United States*, 300 U. S. 506, 513).

The allied contention, only tentatively put forward (pet. br. pp. 21-4, 27-8), that Congress invades the exclusive field of the States by fixing the incidence of its own tax, is reminiscent of the original opposition to any federal death tax which was urged upon the same ground. But death taxes are "a usual subject of taxation" which inheres in "all governments under our constitutional system" (*Knowlton* v. *Moore*, 178 U. S. at 60, see also p. 56), and the power to levy a tax

must embrace the power to dictate who shall bear its burden (*cf. United States* v. *Darby*, 312 U. S. 100 at 124).

Every assertion of federal supremacy involves an invasion of one or another of the reserved powers of the States. The will of Congress would not be supreme if the States could overturn it upon the excuse of exercising their own powers. Many authorities in addition to those cited by the petitioner (p. 52) expound the power of a State over the distribution of assets at death. But the "most characteristic" of State powers may not be so employed as to overrule the Congressional intent or frustrate any federal system or purpose (*Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17 at 24; compare *Hines* v. *Lowrey*, 305 U. S. 85; *Kenney* v. *Supreme Lodge*, 252 U. S. 411)—even the allegedly exclusive powers over the distribution of assets at death (*Santovincenzo* v. *Egan*, 284 U. S. 40; *Childers* v. *Beaver*, 270 U. S. 555; *Nielsen* v. *Johnson*, 279 U. S. 47; T. R. Powell, Abolition of the Federal Inheritance Tax, printed in 67 Cong. Rec. 3797 (1926); cases cited in *Burnet* v. *Brooks*, 288 U. S. 378 at 401 *et seq.*). Petitioner's argument has force only if Congress acts unconstitutionally in seeking to dictate the incidence of its tax.

It is also repeatedly urged that the New York statute takes effect only *after* the tax is paid and so cannot conflict with the federal law. But this is sophistry. The now relevant portion of sec. 124 came into being because of the federal estate tax and is addressed only to that tax. As its history makes clear, its purpose is to overturn the incidence of the federal tax (pp. 2-4, *supra*). Like sec. 826-b, it treats of the single question of who it is who is ultimately to bear the weight of the federal tax. Moreover the federal law regulates the incidence of the tax if distribution of the estate should be made *before* the tax is paid (secs. 826-a, 826-b).

"Construction" and Presumptions as to Congressional Intent.

The "pertinent rule of construction" (pet. br. p. 48) does not require the Court to minimize the extent of the exercise of Congressional power for fear of colliding with any reserved power of the State. "Whenever the constitutional powers of the Federal government and those of the State come into conflict the latter must yield." (*Florida* v. *Mellon*, 273 U. S. 12, 17; compare *United States* v. *San Francisco*, 310 U. S. 16 at 30; see also *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508 at 534-5). In *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, 316, it was said of the contention that an act of Congress must be narrowly construed so as "to preserve the reserved power of the State over the subject in hand"—that it "is too conflicting and unsound to require further notice." A different rule of construction would itself flout the Supremacy Clause.

Other guides to "construction" are asserted (pet. br. p. 48). The decision of the Court of Appeals is indeed "absurd" and "unnecessary" if one begs the questions in this case—whether Congress was in truth indifferent, and whether New York may act in the absence of Congressional assent—and overlooks the effect of sec. 124 on the federal revenue. The decision is "harsh" if, again, one assumes that only the State formula of apportionment achieves justice.

The aid of certain presumptions is also sought (pet. br. pp. 51-2, brief *amici curiae* by Harrison Tweed and Weston Vernon, Jr., Esqs.). First there is the ruling of the Surrogate in New York presuming that the testatrix intended to incorporate sec. 124 in her will (R. 57). The facts do not support, but refute, any such view of her intention (p. 6, *supra*). In this Court it is argued, along this line, only that a testator *might* intend to incorporate the statute when he makes no express provision for the incidence of the tax (brief *amici curiae*, p. 5). And if the presumption does

not purport to find basis in the facts, then one might argue with equal force that, since under familiar principles the federal law is the law of the State (*Hines* v. *Lowrey*, 305 U. S. 85, 91), the testatrix intended to incorporate sec. 826-b. Indeed the facts go far to support this view (p. 6, *supra*). *Irving Trust Co.* v. *Day*, 314 U. S. 556 is obviously not to the contrary. It reads one of the provisions of New York law into a will, but in a situation where the State is competent to act "without restraint from the Federal Constitution" (p. 563).

The argument, without basis in the facts, must then proceed as a matter of law: that New York has exclusive power to dictate the manner of supplying omissions in the will of the testatrix. This is only a restatement of the position that upon the basis of reserved power the State power over the incidence of the tax is superior to the federal power pp. 45-46, *supra*).

The further version of this argument is more elaborate. It rests upon the fact that Congress permitted the testatrix to adjust the incidence of the federal tax. It is argued that Congress must be presumed to have opened the door to State control over her dispositions. But Congress intended its estate tax to fall without recourse to the beneficiaries; it has since so acted as to occupy the field fully; and in any event Congressional assent (unpresumed) is necessary to authorize the State to adjust much less to overturn the incidence of the tax. The unreality of the presumption is apparent: it seeks to overcome the grounds of the decision of the Court of Appeals by assuming their incorrectness rather than by facing them on their merits.

Upon this branch of the case, the decision in *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, is the last—and ultimate—word. It was claimed in that case that a statute of New York establishing a preference upon liquidation of a bank, which was contrary to the rule of equality of the federal banking law, "must be presumed to have entered into the contract of the parties" so that recognition of the prefer-

ence would not contravene the federal law. This Court made short shrift of that contention:

> "If the law of the State is to be read into the contract, then, of course, the law of Congress should also be read into it. We should thus have to consider all the deposits as made with an implication that they were subject to the Federal law and hence the conflict between the two laws would become evident, and the Federal law being paramount would prevail." (p. 288).

Neither in the present case can the general State law be presumed to have entered into the will of this testatrix.

CONCLUSION.

There is actual conflict between Decedent Estate Law sec. 124 and the purpose—past and present—of federal estate tax law. There is also conflict in respect of the amount to be collected by the federal government. In any event the State has no standing to meddle with the comprehensive federal estate tax system which rests upon complete and independent federal power. The State law destroys the uniform operation of the federal law and is an unworkable supplement to the federal system. The Supremacy Clause justifies and indeed contemplates that any reserved State power must bow to the exercise of federal power. No mere presumption can serve to obscure these fundamental issues.

The order of the Court of Appeals and the decree of the Surrogate's Court entered upon remittitur should be affirmed.

October 14, 1942

Respectfully submitted,

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Appendix 1.

INTERNAL REVENUE CODE SEC. 826. COLLECTION OF UNPAID TAX.

(a) *Sale of Property.*—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement Out of Estate.*—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of Life Insurance Beneficiaries.*—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Appendix 2.

NEW YORK DECEDENT ESTATE LAW §124. APPORTIONMENT OF FEDERAL AND STATE ESTATE TAXES; EXECUTOR OR ADMINISTRATOR TO DEDUCT TAXES FROM DISTRIBUTIVE SHARES

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as

may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a

fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.

NEW YORK TAX LAW §249-t. JURISDICTION OF THE SURROGATE.

1. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent which estate is subject to tax under this article, or to appoint a trustee of such estate, or any part thereof, or to grant ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, including

specifically, but without limitation, jurisdiction to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided * * *.

Appendix 3.

Sen. Rep. 114, 61st Cong., 1st session

INHERITANCE-TAX LAWS

Digest of the Principal Features of the Laws of Great Britain, France and Germany, Together with an Outline of Inheritance Taxation in the United States and a Collection of Judicial Decisions Relating Thereto.

INTRODUCTORY.

(P. 7, Emphasis is ours). "1. While inheritance taxes have long been a source of revenue among European countries, it is only within recent years that high progressive rates have been imposed anywhere in Europe except in Switzerland. In the use of progressive inheritance taxes as an important source of revenue, Great Britain may be said to have led the way among the principal countries in the finance act of 1894, which, with some modifications, is still in force. This act, with its amendments, imposes upon estates of decedents, before division, an 'estate duty' graduated, according to the value of the estate, from about 1 per cent on estates between £100 and £500 in value to from 10 to 15 per cent on estates exceeding £750,000 in value. There are, besides, a 'legacy duty' on personal property and a 'succession duty' on real

estate passing to collateral heirs, graduated, according to the relationship existing between the decedent and the heir, from 3 per cent for brothers and sisters to 10 per cent for distant relatives and strangers in blood. *Nominally these taxes apply also to direct heirs, at the rate of 1 per cent, but payment of estate duty* releases direct heirs from legacy or *succession duty.*"

* * * * * *

(P. 8, emphasis is ours). 2. As already remarked, inheritance taxes in Great Britain comprise an **'estate duty'** (which is the development merely of what was formerly a 'probably duty'), **levied in respect of the whole estate before distribution,** a 'legal duty' chargeable against legacies or distributive shares of personal property, and a 'succession duty' by which real estate which passes at death is subjected to taxation. Each of these forms of duty has had its counterpart in taxes imposed by legislation of Congress. Thus, the stamp act of July 6, 1797, imposed a legacy duty (p. 42, herein); by the act of July 1, 1862, another legacy duty was levied, as well as a probate duty (pp. 42, 43, herein); the act of June 30, 1864, amended July 13, 1866, imposed a succession duty (pp. 43, 44, herein), and by the act of April 12, 1898, a progressive legacy duty was again levied (p. 45, herein). The United States Supreme Court, in a decision sustaining the constitutionality of the last mentioned act, after reviewing previous legislation, said:

> 'Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—leaving out of view the differences in rates and the administrative provisions—were substantially identical, and of a threefold nature, that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a suc-

cession duly charged against each interest in real property. (*Knowlton* v. *Moore*, 178 U. S. 51.)"

* * * * * *

(P. 9). A national tax so graduated as to seriously affect swollen fortunes, it may be, would produce a surplus, other sources of revenue remaining unchanged. In this connection the plan followed by the German Empire of allotting a part of the proceeds to the several States is suggestive, the point for consideration being whether this plan of distribution is capable of adaptation, at least in beneficial effect if not by any form of donation or division, by which it could be made to conform to the governmental system established in this country—whether, for example, a Federal inheritance tax could not be framed for the Unites States whereby, for the purpose of expenditure and disbursement pursuant to appropriations for national objects and in furtherance of the general welfare, the proceeds of the tax, in whole or in part, would be apportioned among the several States according to their respective returns, and thus in effect be allowed to remain in the States where collected."

Appendix 4.

The Revenue Act of 1924 was already in process in February, 1924; the House Committee had already reported (H. R. No. 179, 68th Cong., 1st Sess., Cum. Bull. 1939-1, p. 241, dated Feb. 11, 1924). The report of the Senate Committee reads:

"A sentence has been inserted in paragraph (3) and in paragraph (3) of subdivision (b) (of section 303) to make it clear that the amount deductible under these paragraphs on account of bequests, legacies, or devises for the specified benevolent purposes shall be the net

amount distributable for such purposes, after estate, legacy, or inheritance taxes imposed in respect thereof have been deducted therefrom. It is evident that if a testator leaves a residuary estate of $1,000,000 to a charity, but the estate taxes payable out of the residue reduce the amount actually distributed to the charity to $950,000, only the latter amount should be deductible, in computing the amount of the net estate, as a bequest to charity. This sentence so provides" (Sen. Report #398, 68th Cong. (1st Sess.), C. B. 1931-1, p. 290, April 1924).

The House Committee accepted the amendment. Its supplemental report reads:

"An additional sentence has been added to these paragraphs to provide that the amount deductible under such paragraphs on account of bequests, legacies, devises, or transfers for the specified benevolent purposes shall be the net amount distributable for such purposes after estate, legacy, or inheritance taxes imposed in respect thereof have been deducted therefrom" (H. R. #844, 68th Cong. (1st Sess.), C. B. 1939-1, p. 308, May 1924).

Appendix 5.

INTERNAL REVENUE CODE SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate.

(a) *Exemption.*—An exemption of $100,000;

* * * * *

(d) *Transfers for Public, Charitable, and Religious Uses.* —The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

Appendix 6.

The Survey, November 23, 1918—"Mrs. Sage's Will and the Federal Estate tax," by Robert W. DeForest. The author, after referring to the fact that the charities which were residuary legatees under Mrs. Sage's will bore the entire tax on her large estate (*cf. Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61), stated:

> "Undoubtedly it is this consideration which has led the Finance Committee of the Senate to propose an amendment to the tax bill already adopted by the House whereby the Federal estate tax shall hereafter be imposed on individual legacies and not on the estate as such, and it is earnestly to be hoped that if any estate

tax remains in the present revenue bill it shall be imposed in this way."

Appendix 7.

PROPOSED REVENUE ACT OF 1942:

"826-(d) *Liability of recipient of property over which decedent had power of appointment.* Unless decedent directs otherwise under his will, if any part of the gross estate upon which the tax has been paid consists of the value of property included in the gross estate under section 811 (f), the executor shall be entitled to recover from the person receiving such property by reason of the exercise, non exercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the net estate and the amount of the exemption allowed in computing the net estate."

The Committee comment on this amendment is as follows: (H. R. 2333, 77th Congress, 2d Session, p. 161)

"A new subsection (d) added to section 826, entitles the executor to recover from the recipient of appointive property the portion of tax allocable to such property. The decedent, however, may provide otherwise in his will. This section applies where the recipient takes or holds the property upon the decedent's exercise, non exercise, or release of the power, regardless of local rules with respect to the receipt of the property from the creator of the power. The purpose of this amendment is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property."

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR BYRON CLARK, JR., AS EXECUTOR, RESPONDENT

BYRON CLARK,
ANTHONY J. CAPUTO,
Counsel for Byron Clark, Jr.,
as Executor, Respondent.

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BRIEF FOR BYRON CLARK, JR., AS EXECUTOR, RESPONDENT

The history of this litigation is set forth adequately and correctly in Petitioner's Brief and will not be repeated here. Byron Clark, Jr., as Executor, although a Respondent, takes the same position before this Court as the Petitioner and joins in his prayer that the order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered thereon be reversed.

The Question Presented

The question presented on this appeal is whether Section 124 of the New York Decedent Estate Law which

requires the Surrogate, except where the testator otherwise directs in his will, to apportion the federal estate tax among the persons interested in the estate, is in such conflict with Section 826(b) of the Internal Revenue Code which provides that the federal estate tax, unless otherwise directed in the will, is to be paid out of the estate before distribution, as to violate the Constitution of the United States.

Summary of Argument

This Respondent respectfully contends that there is no such conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law as to bring into operation the supremacy clause of the Federal Constitution. He contends that both laws may operate without substantial conflict in this case as they have in thousands of prior cases and that the alleged conflict is non-existent. He further says that if there is any question as to conflict, the provisions of Section 826(b) of the Internal Revenue Code specifically recognize the right of the several states to fix or alter the ultimate incidence of the tax.

POINT I

Section 124 of the New York Decedent Estate Law does not conflict with Section 826(b) of the Internal Revenue Code and does not violate the supremacy clause of the Constitution of the United States.

In *Matter of del Drago*, 287 N. Y. 61, the Court of Appeals by a bare majority construed the Federal Estate Tax Law as exacting a tax payable out of the net residuary estate, in the absence of a provision in the will directing payment from another source. Based on this construction the majority of the Court held that Section 124 of the

Decedent Estate Law was in conflict with Section 826(b) of the Internal Revenue Code in so far as Section 124 provides that the Surrogate must apportion the Federal Estate Tax among the several persons interested in the estate, even though there is no provision in the will directing such apportionment. Consequently, the State Court held that the statute was repugnant to Article Six, Clause Two of the Constitution of the United States which provides that the laws of the United States shall be the supreme law of the land.

Section 826(b) of the Internal Revenue Code provides in part that

> "* * * it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution".

Section 124 of the New York Decedent Estate Law provides as follows:

> "Whenever it appears from any accounting, * * * that an executor * * * *has paid* a death tax levied * * * under the provisions of the United States revenue act * * * the amount of the tax *so paid*, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues". (Italics ours.)

It will be noted that the Surrogate is directed *after the payment* of the Federal Estate Tax to equitably apportion the amount of the tax among the beneficiaries if the will is silent as to who shall bear the burden of paying said tax.

At 287 N. Y. 61, at Page 77 (R. 73) the majority of the Court of Appeals said

> "The federal acts place the incidence of the tax upon the **net residuary estate** payable by the executor be-

fore distribution *without recourse to the individual legatees.*"

(Italics supplied by Court—black face type ours.)

The error in the opinion of the majority of the Court lies in the statement that the estate tax is payable out of the *net residuary estate* and without recourse to the several legatees. The *net residuary estate* is that which remains after the authorized deductions set forth in Section 812 of the Internal Revenue Code and the legacies are deducted from the gross estate. Congress did not intend that the estate tax was to be exacted from this entity and has expressly stated that the tax was to be levied on the *net estate* which means the gross estate less the amount of the authorized deductions only. In other words, the difference between "net estate" and "net residuary estate" is that the former is the estate before payment of legacies and the latter the estate remaining after payment of the legacies.

Section 810 of the Internal Revenue Code provides that the tax is imposed on

> "* * * the transfer of the net estate of every decedent, citizen or resident of the United States * * *".

Section 930 of the Internal Revenue Code provides that

> "The term 'net estate' means the net estate as determined under the provisions of Section 812 or 861: * * *".

Section 812 of the Internal Revenue Code contains no provision for the deduction of legacies in arriving at the entity constituting the "net estate". The decision of the Court of Appeals to the effect that the tax is payable out of the "net residuary estate" in effect distorts the method of exacting the tax as enacted by Congress, since it necessarily contemplates that legacies are to be deducted before the tax is computed. Section 861 deals with deduction allowed to nonresidents and therefore immaterial for our purposes.

In addition to violating the express direction of Congress, the contention of the majority of the Court of Appeals would saddle the entire burden of the tax upon the recipients of the residuary estate who are usually the main objects of the testator's bounty. In such event, it is not improbable that in many cases the residuary estate would be seriously depleted or even wiped out after the taxes have been paid solely from this source.

The Court of Appeals committed further error when it stated that there could be no recourse to the legatees for payment of their proportionate share of the tax, There is nothing in the federal statute which warrants such a conclusion.

In cases where the legacies are large, the residuary estate may not suffice to pay the federal tax yet it could not be contended that because of the lack of funds in the residuary estate, payment of the estate tax could be avoided. The only alternative is recourse to the legatees. In his dissenting opinion Judge Desmond pointed out that this would be done even in the absence of any direction in a statute directing apportionment as a measure of intelligent administrative procedure. At page 83, he said

> "Even without a state prorating statute, there are cases where mathematically, the tax cannot be paid out of the residue, but must be charged immediately on the several bequests or devises. Suppose a case where there is no residue, as where the general legacies equal or exceed the actual net estate. In such a case the executor, paying the federal tax from the 'net estate', is in fact deducting it from the amount available for the general legacies. Would he then not have to prorate it against those legacies, whether or not any statute so directed?"

The federal statute directs payment out of the net estate when the testator does not direct otherwise. The statute does not directly or indirectly prohibit the several states

from setting up a system of apportionment among the persons interested under the will after the tax has been paid by the executor. The apportionment is necessarily made after the tax has been collected by the federal government at which time the purpose of the Congress to raise revenue has already been fulfilled. The entire proceeding thereafter involves the distribution of the estate by the executor, which function this court has repeatedly held to be a matter of state regulation.

Section 124 in operation does not interfere with the sovereign right of the Congress to collect an estate tax nor does it limit or abridge the manner selected by Congress. It does not alter the method of assessment or the levying of the tax, and does not conflict with the provisions of the federal statute which place the tax upon the net estate as a unit.

It has been settled by repeated decisions of this Court that before a state statute will be declared unconstitutional on the ground of conflict with a federal statute, the two must be in such irreconcilable conflict that both cannot stand together.

In *Kelly* v. *State of Washington*, 302 U. S. 1, this Court said at page 10:

> "The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' * * *".

This Court has recognized the presumption that every state statute is constitutional, and that before the sentence of nullification is pronounced every possibility of constitutionality must be excluded.

Corporation Commission of Oklahoma v. *Lowe*, 281 U. S. 431, 438.

Judged by the above test and benefited by the foregoing presumption, the New York Statute is clearly constitutional. The pragmatic test of time and the actual operation of this statute since 1930 is some indication that the alleged conflict herein is non-existent.

POINT II

Congress levied the tax on decedents' estates without regard and with complete indifference to the ultimate incidence of the Estate Tax.

The existence of the provision in Section 826(b) of the Internal Revenue Code recognizing the right of a testator to specifically indicate the persons by whom the burden of the tax is to be borne shows that Congress was not interested as to the ultimate incidence of this tax.

Congress derives its sole power in the premises from the revenue raising provisions of the Constitution in Article one, Section Eight, since there is no specific provision in the Constitution delegating to Congress any power of the regulation of estates. The strained basis of unconstitutionality adopted by the Court of Appeals would extend the power of Congress to levy a tax on decedents' estates to the field of regulating the distribution of decedents' estates. We do not believe that Congress had any intention of invading such doubtful territory when no need for such action existed.

This Court has affirmed and reaffirmed recently the rule that the power to control decedents' estates is vested exclusively in the several states and that the right of a testator to provide for distribution of his estate is derived from the state.

New York Trust Co. v. *Eisner*, 256 U. S. 345;
Irving Trust Co. v. *Day*, 314 U. S. 556.

Conclusion

The order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered on the remittitur of the Court of Appeals should be reversed.

Dated, October 8, 1942.

Respectfully submitted,

BYRON CLARK,
ANTHONY J. CAPUTO,
Counsel for Byron Clark, Jr.,
as Executor, Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~980~~ 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

PETITION AMICUS CURIAE OF ATTORNEY GENERAL OF NEW YORK STATE IN SUPPORT OF WRIT OF CERTIORARI.

JOHN J. BENNETT, JR.,
Attorney General, New York State,
Capitol, Albany, N. Y.

HENRY EPSTEIN,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

PETITION IN SUPPORT OF WRIT OF CERTIORARI.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of New York, by your petitioner, as Attorney General, respectfully urges a favorable consideration of the petition for writ of certiorari in the above case, now pending before this Honorable Court

Under the New York Constitution, the Attorney General is the head of the Department of Law and, under the State Executive Law (§ 68) whenever the constitutionality of a New York statute is brought into question in the New York courts and an appropriate order is made, he is charged with the duty to appear therein in support of the constitutionality of such statute.

Appellants brought this case from the Surrogate's Court to the Court of Appeals of the State by direct appeal pursuant to Article VI, sec. 7, subdiv. 3, of the New York Constitution and supplemental statute (Civil Practice Act, § 588 subd. 3), which provide that a direct appeal may be taken where the only question involved is the Constitutional question, and that the Court of Appeals on such appeal shall consider and determine only the Constitutional question. It is therefore quite indisputable that the Constitutional question was necessarily involved (See Remittitur of Court of Appeals and denial of motion to amend same).

The Question Presented by the Appeal.

The appeal presents the single question—whether a New York statute, Decedent Estate Law, sec. 124 is unconstitutional as repugnant to the Federal Estate Tax Act and as violating the supremacy or uniformity clauses of the Federal Constitution.

The majority of the Court of Appeals construed the Federal Estate Tax Law, and Section 826(b) of the Internal Revenue Code in particular, as placing the ultimate incidence of the tax upon the net *residuary* estate. It then determined that the New York statute which required, in the absence of a provision in the will directing otherwise, proration of the amount of the federal tax was repugnant to the Federal Estate Tax Law and to so much of Section 8, Article VI, of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The majority also held that even though Congress may have failed to fix the incidence of the tax completely, a state may not constitutionally supplement such omissions in the federal act.

The court determined that there could be no uniform operation of the federal estate tax if each state determined for itself how the burden of the tax should be borne, and for this reason held Section 124 of the Decedent Estate Law to be repugnant to so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

The Federal Estate Tax Act imposes an excise tax on the interest of a decedent which passes by reason of his death. Congress, by that Act, has laid the tax and has provided that it shall be collected from "the executor," that is to say, from a State fiduciary rather than from any of the parties beneficially interested. Section 124 of the New York statute provides that, whenever it appears upon any accounting or other proceeding, an Executor "has paid" the Federal Estate Tax, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated—that is to say, by the State fiduciary on his accounting, subject to the approval of the court, among the persons actually interested in the Estate to whom any benefit accrues. Such right and power springs from a State's control over testamentary dispositions as well as from its control of its fiduciaries.

This question would appear to be one of nation-wide importance, affecting the right of each State, through its Judiciary, in the absence of a statute, to deal with the incidence of the Federal estate tax after the State fiduciary "has paid" the tax and obtained his duly-receipted tax bill, and, in case of a State statute, the right and power of State Legislatures to enact such an act dealing with such incidence.

The History of §124, Decedent Estate Law.

Section 124 was drawn by two State Commissions acting together, the State Tax Commission and the Decedent Estate Commission. The latter Commission was created in 1927 to investigate defects in the Laws of Estates. Its work continued for a period of several years and resulted in a complete modernization of the New York statutes relating to descent and distribution and the administration and taxation of estates.

In 1929 these two Commissions undertook to reform the State laws to take advantage of the federal system as to over-all rates and prompt collection of the tax from a fiduciary, to provide for judicial supervision of the fiduciary upon his accounting, to enunciate a State public policy that the burden of Federal and State death taxes should follow the benefit, and to give the bar two similar tax acts with similar form of returns, leading to similar hearings, with the result that a determination upon almost any point by the Federal or State Tax Departments would become helpful upon a determination of similar points by the other Department. These Commissions spent a large amount of time and care on this revision, and in 1930 presented their proposal to the Legislature. Section 124 was not an isolated Act. The Commissions separated their proposals into three companion bills which the Legislature adopted as Chapters 709, 710 and 711 of the Laws of 1930. Chapter 709 dealt with the apportionment of the Federal Estate Tax, Chapter 710 set forth a new State tax law, and Chapter 711 provided for composition of taxes over-paid on closed Estates. All three were signed and approved by Governor Roosevelt.

This legislation, accomplished by two outstanding State bodies, has worked satisfactorily, fairly and equitably from

1930 to 1941, and, from time to time, has had the approval of the Court of Appeals (*Matter of Duryea*, 277 N. Y. 310, 316; *Matter of Vanderbilt*, 281 N. Y. 297, 316). Referring specifically to Chapter 709 (now D. E. L. sec. 124), many citizens of New York, from 1930 to 1941 have made wills relying on Section 124. The members of the Commissions were probably the most experienced group in the State who conceivably could have been appointed to carry on the work. The members of the Decedent Estate Commission included the Surrogates in the four most populous Counties in the State who were constantly dealing with tax questions in connection with estates, James A. Foley, of New York, Chairman, the late Louis B. Hart, of Buffalo, the late George A. Slater, of Westchester, and General George A. Wingate, of Kings; members of the Legislature, including Edmund B. Jenks, George R. Fearon and Samuel Mandelbaum, later District Judge, and lawyers appointed by Governor Alfred E. Smith, including John G. Saxe, Esq., later President of the New York State Bar Association.

The Commissions when they drew the Act in 1929 had before them among other factual data the opinion of the Circuit Court of Appeals in *Edwards v. Slocum* (287 Fed. 651, affirmed, 264 U. S. 61). On the appeal to the Supreme Court distinguished counsel for the Government representing the Department of Justice and the Treasury Department expressly accepted and restated the following as "fundamental and conceded" propositions stated by Judge Hough in the Circuit Court of Appeals:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter."

In particular the commissions had before them Section 303(a) (3) of the Revenue Act of 1924, where the Congress *expressly* confirmed the same position as to the Estate Tax Act itself.

It is this Section 124, approved by the Courts for eleven years which the Court of Appeals of New York has now suddenly and unexpectedly by a vote of four to three held to be invalid as repugnant to the Federal Estate Tax Law and as violation of the supremacy and uniformity clauses of the Federal Constitution. And in so doing the Court of Appeals adopted a construction of the Federal statute leading to absurd harsh and unnecessary results in disregard of this Court's settled principles of statutory construction.

The Statute is not unconstitutional as repugnant to the Federal Estate Tax Law.

Alexander Hamilton pointed out in "The Federalist" (No. 32):

> "* * * it is not a mere *possibility* of inconvenience in the exercise of powers but an *immediate, constitutional* repugnancy which can by implication alienate and extinguish a pre-existing right of sovereignty." (Emphasis supplied.)

Hamilton was discussing the possibility of inconvenience in the exercise by Federal and State Governments to their concurrent power to levy and collect taxes.

The asserted repugnancy in the present case is infinitely more remote. The power conferred on the Congress is "to lay" and "to collect" (U. S. Constitution, Article I, sec. 8), and in this case the asserted repugnancy is between a Federal statute laying an excise tax on a gross estate (including transfers by will, transfers by deed, estates in survivorship, tenancies in common and what not), and a State stat-

ute, which, by its very terms, becomes applicable only after the Federal Government has laid and collected the tax, and a state fiduciary of the State "has paid" it. It is then and then only that the State statute authorizes the appropriate state courts to make sure that its own fiduciary, in his accounting as to his acts as fiduciary, shall show that he has done justice in marshalling his payments, so that, so far as possible, the burden will follow the benefit.

This Court has said—and the principle has often been reaffirmed—"* * * repugnancy or conflict should be *direct* and *positive*, so that the two Acts *could not be reconciled or consistently* stand together." *Reid v. Colorado*, 187 U. S. 137, 148; *Sinnot v. Davenport*, 22 How. 227, 243.

§124 is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The requirement in the United States Constitution that Federal excise taxes shall be uniform throughout the United States is not a proper ground for holding state statutes unconstitutional, *Peacock v. Pratt*, 121 Fed. 772. And the Federal statute construed so as to permit the states to determine the final incidence of tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips v. Commissioner*, 283 U. S. 589, 602.

Section 124 as applied to the estate of Josephine Del Drago is valid as imposing a condition of her will-making privilege in respect of the final incidence of this tax expressly left to her will by the Federal Estate Tax Law.

Whatever meaning is placed upon Section 826(b) of the Internal Revenue Code it specifically leaves the determination of the incidence of the tax to testator's will. A will can have no force or meaning except as it is construed,

regulated and affected by applicable state law upon which it depends for its existence. *Irving Trust Co. v. Day*, ... U. S. ..., January 5, 1942; *Matter of Bergdoff*, 206 N. Y. 309, 316.

Consequently by necessary implication Congress has left unimpaired the authority of the states to determine the final incidence of the tax already paid to it through their power to impose a condition on the will-making privilege. The Federal statutes (Sec. 812(d), Sec. 826,(b), (c)) would seem to empower the decedent to do by will what the State of New York, having jurisdiction of distribution, as well as of original probate of the will, is by this decision denied authority to direct by legislative act. The power of the State is at least equal to the influence of the "dead hand" in the application and construction of Federal statutes.

WHEREFORE, the undersigned, as Attorney General of New York State, respectfully prays that the petition herein be granted, and that he, as such Attorney General, be permitted to intervene and to participate in the argument.

Albany, New York, February 17th, 1942.

JOHN J. BENNETT, JR.,
Attorney General New York State,
Capitol,
Albany, New York.

HENRY EPSTEIN,
Solicitor General,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Capitol, Albany, New York.

HENRY EPSTEIN,
Solicitor General,
MILTON KAPLAN,
Assistant Attorney General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Respondents.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE.

The Attorney General of the State of New York respectfully submits this brief as a friend of the Court, urging the reversal of the order of the Court of Appeals of the State of New York and the order entered thereon. The validity of §124 of the New York Decedent Estate Law is drawn in issue, but the concern of the State of New York represents more than anxiety for the fate of an isolated statute. The section in question is an integral factor in the New York State legislative scheme to modernize the Decedent Estate Law, repair the legal machinery for transmission of decedents' property, and eliminate inequities suffered by certain classes of dependents of unjust or shortsighted testators.

Under the New York Constitution, the Attorney General is the head of the Department of Law and, under the State Executive Law (§68) whenever the constitutionality of a New York statute is brought into question in the New York courts and an appropriate order is made, he is charged with the duty to appear therein in support of the constitutionality of such statute.

Statement.

Appellants brought this case from the Surrogate's Court to the Court of Appeals of the State by direct appeal pursuant to Article VI, §7, subd. 3 of the New York Constitution and the supplemental statute (Civil Practice Act, §588, subd. 3), which provide that a direct appeal may be taken where the only question involved is the constitutional question, and that the Court of Appeals on such appeal shall consider and determine only the constitutional question. It is therefore quite indisputable that the constitutional question was necessarily involved (See Remittitur of Court of Appeals and denial of motion to amend same).

The majority of the Court of Appeals construed §826(b) of the Internal Revenue Code as placing the ultimate incidence of the federal estate tax upon the net *residuary* estate. It then determined that the New York statute which required, in the absence of a provision in the will directing otherwise, proration of the amount of the federal tax was repugnant to said federal law, violating the supremacy and uniformity clauses of the Federal Constitution. The question of constitutionality on those two points is the sole issue on this appeal.

The Federal Estate Tax Act imposes an excise tax on the interest of a decedent which passes by reason of his

death. Congress, by that Act, has laid the tax and has provided that it shall be collected from "the executor," that is to say, from a State fiduciary rather than from any of the parties beneficially interested. Section 124 of the New York statute provides that, whenever it appears upon any accounting or other proceeding, an executor "has paid" the federal estate tax, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated—that is to say, by the State fiduciary on his accounting, subject to the approval of the court, among the persons actually interested in the estate to whom any benefit accrues. Such right and power springs from a State's control over testamentary dispositions as well as from its control of its fiduciaries.

This question would appear to be one of nationwide importance, affecting the right of each State, through its judiciary, in the absence of a statute, to deal with the incidence of the federal estate tax after the State fiduciary "has paid" the tax and obtained his duly receipted tax bill, and, in case of a State statute, the right and power of State legislatures to enact such an act dealing with such incidence. The instant appeal involves the latter.

The History of § 124 of the Decedent Estate Law.

Section 124 was drawn by two State Commissions acting together, the State Tax Commission and the Decedent Estate Commission. The latter Commission was created in 1927 to investigate defects in the Laws of Estates. The members of the Commissions were probably the most experienced group in the State who conceivably could have been appointed to carry on the work. Among these were

included the surrogates in the four most populous counties in the State who were constantly dealing with tax questions in connection with estates; members of the State Legislature; and prominent members of the New York Bar. The work continued for a period of several years and resulted in a complete modernization of the New York statutes relating to descent and distribution and the administration and taxation of estates.

In 1929 these two Commissions undertook to reform the State inheritance tax law—to expedite their application in the light of the federal estate tax system; to provide for judicial supervision of the fiduciary upon his accounting and to enunciate a State public policy that the burden of Federal and State death taxes should follow the benefit. The Decedent Estate Commission in particular recommended (among other recommendations) that widows or surviving husbands be protected against disinheritance by unjust testators, and that certain exemptions in favor of the surviving spouse or children be increased to meet modern economic conditions.

These Commissions spent a long period of time and much care on this revision, and in 1930 presented their proposal to the Legislature. Section 124 was not an isolated act. Three important companion bills (Chs. 709, 710 and 711, Laws of 1930) were adopted by the Legislature and approved by Governor Roosevelt.

This legislation, accomplished by two outstanding State bodies, has worked satisfactorily, fairly and equitably from 1930 to 1941, and, from time to time, has had the approval of the Court of Appeals (*Matter of Duryea*, 277 N. Y. 310,

316; *Matter of Vanderbilt*, 281 N. Y. 297, 316). Referring specifically to Chapter 709 (now D. E. L. sec. 124), many citizens of New York, from 1930 to 1941 have made wills relying on § 124.

The Commissions when they drew the Act in 1929 had before them, among other factual data, the opinion of the Circuit Court of Appeals in *Edwards v. Slocum* (287 Fed. 651, affirmed, 264 U. S. 61). On the appeal to the Supreme Court distinguished counsel for the Government representing the Department of Justice and the Treasury Department expressly accepted and restated the following as "fundamental and conceded" propositions stated by Judge Hough in the Circuit Court of Appeals:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

In particular the Commissions had before them § 303(a)(3) of the Revenue Act of 1924, where Congress *expressly* confirmed the same position as to the Estate Tax Act itself.*

It is this § 124, approved by the Courts for eleven years which the Court of Appeals of New York has now suddenly and unexpectedly by a vote of four to three held to be invalid as repugnant to the Federal Estate Tax Law and as a violation of the supremacy and uniformity clauses of the Federal Constitution. And in so doing the Court of Appeals adopted a construction of the federal statute leading

* See also—34 Columbia Law Rev. 526.
54 Harvard Law Rev. 690.

to absurd, harsh and unnecessary results in disregard of this Court's settled principles of statutory construction.**

ARGUMENT.

A. The statute is not unconstitutional as repugnant to the Federal Estate Tax Law.

Alexander Hamilton pointed out in *The Federalist*, No. 33 (1788):

> "• • • it is not a mere *possibility* of inconvenience in the exercise of powers but an *immediate, constitutional* repugnancy which can by implication alienate and extinguish a pre-existing right of sovereignty." (Emphasis supplied.)

Hamilton was discussing the possibility of inconvenience in the exercise of Federal and State Governments to their concurrent power to levy and collect taxes.

This Court has said—and the principle has often been reaffirmed—"• • • repugnancy or conflict should be *direct* and *positive*, so that the two Acts *could not be reconciled or consistently* stand together." *Reid v. Colorado*, 187 U. S. 137, 148; *Sinnot v. Davenport*, 22 How. 227, 243.

The asserted repugnancy in the present case is infinitely more remote. The power conferred on the Congress is "to lay" and "to collect" (U. S. Constitution, Article I, sec. 8),

** Current comment is almost uniform in disapproval of the result and decision below:

N. Y. U. Law Quarterly Review—Mar. 1942—pp. 321-2.
U. of Chicago Law Review—April 1942—p. 528.
Yale Law Journal—Vol. 51—pp. 1202-1208.
Fordham Law Review—Vol. II—pp. 224-6.

and in this case the asserted repugnancy is between a federal statute laying an excise tax on a gross estate (including transfers by will, transfers by deed, estates in survivorship, tenancies in common and what not), and a State statute, which, by its very terms, becomes applicable only after the Federal Government has laid and collected the tax, and a fiduciary of the State "has paid" it. It is then and then only that the State statute authorizes the appropriate state courts to make sure that its own fiduciary, in his accounting as to his acts as fiduciary, shall show that he has done justice in marshalling his payments, so that, so far as possible, the burden will follow the benefit.

Not only are the Decedent Estate Law, § 124, and the Federal Estate Tax Law perfectly timed and geared for operation without friction; they also represent the exercise by the respective sovereignties in separate spheres of governmental activity of powers inherently divergent in their essential characters. The Federal Estate Law is a revenue measure designed for the purpose of providing financial means to enable the Federal Government to discharge its functions. The power over transmission of property from the dead to the living and probate of wills, traditionally reserved to the States, is entirely distinct and independent both in derivation and development. Alexander Hamilton, *The Federalist*, No. 33 (1788); 1 *Page on Wills* (1941) 53; *Frew v. Bowers*, 12 Fed. 2nd, 625, 628 (1926).

A common object of State regulation is to restrict the exercise of the power to make a will in order to protect certain classes of dependents. 1 *Page on Wills* (1941), §§ 37 *et seq.* In New York State, regulations to attain that end, as brought up to date by the 1930 reforms, include restric-

tions upon devises or bequests to charitable and other societies by persons having certain dependents; a right of election by a surviving spouse against or in the absence of a testamentary provision; a requirement that courts approve compromises in controversies relating to decedents' estates for the protection of infants, incompetents, and others; and a provision for children born after the parent's will is executed, under particular circumstances.*

Estate taxes are assuming sizeable proportions. In the computation of property passing at death the rates of the federal tax alone have sky-rocketed during the period from 1926 to 1941. The payment of the federal estate tax although in theory imposed upon the transmission of property of deceased persons, and not upon the succession of beneficiaries, "may, however, seriously affect the decedent's plans and even mutilate them beyond recognition." 1 Paul, *Federal Estate and Gift Taxation* (1942), 774. It is easily demonstrable that where the testator fails to fix the burden of estate taxes the whole program of State legislation designed to protect his dependents might be defeated by the unfortunate coincidence of the tax burden. New York State sought to remedy the situation and eliminate hardship and inequities by taking into account the important factor of estate taxes, and by enunciating a policy of having their burden follow benefit.*

A construction of the federal estate tax law in derogation of § 124 of the Decedent Estate Law—which may threaten the whole scheme of protection of dependents—can be jus-

* Decedent Estate Law, §§ 17, 18, 19 and 26, respectively.

* See the Note of the Decedent Estate Commission to Ch. 709, L. 1930, *13 McKinney's Consolidated Laws of New York*, p. 420, set out in part in Brief of Petitioner under heading "The Importance of the Question."

tified only by clear and unequivocal expression by Congress; surely not by devious and forced inference.

A regulation by Congress that the residuary estate is to meet the entire burden of federal estate taxes would be valid only if clearly related to the exercise of the federal taxing powers granted by the Constitution. That Congress had no motive for, and in fact did not intend to so regulate appears from the provisions in §812(d) and §826(b), (c) of the Internal Revenue Code which specifically leave the determination of the burden of the tax to the will of the testator. A Congressional regulation incidental to the exercise of the taxing power would almost of necessity require uniform application. Uniformity is not attained where the regulation yields to the independent judgment of the individual testator.

On the other hand, the net effect would be purely negative, serving merely to embarrass the State Legislature in the legitimate exercise of a State function. For the "will" of the testator to which the privilege of determining the incidence of the federal estate tax is addressed is not an unrestrained abstract expression by the testator, but rather a legal instrument conditioned by State Law. Sections 14, 26, 38, 40, 41, 47, and 125, as well as section 124 of the Decedent Estate Law are examples of valid conditions attached by the State to the will-making privilege. "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." *Irving Trust Co. v. Day*, 314 U. S. 556, 563 (1942). A will can have no force or meaning except as it is construed, regulated and affected by applicable State rules upon which it depends for its exist-

ence. "A testator intends and must be deemed to intend the results which the application of those rules produce. They affect the testamentary disposition and provisions as though embodied in the will; * * *." *Matter of Bergdorf*, 206 N. Y. 309, 316, 317 (1912).

It is inconceivable that Congress would empower the testator—acting entirely by sufferance of the State—to determine the final incidence of the tax; yet reject a construction of the will to the same effect, imposed by New York State when the testator is silent. The result would be anomalous if not absurd, and, we respectfully submit, was never intended. The "dead hand" would indeed then triumph over the sovereign power.

B. Section 124 of the Decedent Estate Law is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The requirement in the United States Constitution that federal excise taxes shall be uniform throughout the United States is not a proper ground for holding State statutes unconstitutional. *Peacock v. Pratt*, 121 Fed. 772. And the federal estate tax statute construed so as to permit the States to determine the final incidence of the tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips v. Commissioner*, 283 U. S. 589, 602.

The Order of the Court of Appeals and the Order of the Surrogate's Court of New York entered thereon should be reversed and the validity of Section 124 of the Decedent Estate Law sustained.

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HENRY EPSTEIN,
Solicitor-General,

MILTON KAPLAN,
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Of Counsel.

Other States Joining Herein.

The undersigned States, by their respective Attorneys General, do hereby join in the foregoing brief of the State of New York as *amicus curia* and urge upon this Honorable Court the contentions therein advanced.

STATE OF FLORIDA
By—
J. Tom Watson,
Attorney General.

STATE OF VERMONT
By—
Alban J. Parker,
Attorney General.

STATE OF GEORGIA
By—
Ellis Arnall,
Attorney General.

STATE OF ARKANSAS
By—
Leffel Gentry,
Attorney General.

STATE OF NEW MEXICO
By—
Edward P. Chase,
Attorney General.

STATE OF MICHIGAN,
By—
Herbert J. Rushton,
Attorney General.

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v.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee.

On Writ of Certiorari to the Surrogate's Court of New York County, State of New York.

BRIEF OF AMICI CURIAE.

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THE MCQUEEN PRESS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 30.

LAWRASON RIGGS, JR., Special Guardian, *Petitioner*,

v.

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST COMPANY, as Trustee.

On Writ of Certiorari to the Surrogate's Court of New York County, State of New York.

BRIEF OF AMICI CURIAE.

The undersigned, members of the Bar of this Court, respectfully submit this brief as *amici curiae*, the consent of counsel for all parties having been first obtained. The undersigned act as counsel for trustees of a trust the rights of beneficiaries of which will be affected by the final determination which shall be made in this cause, and, therefore, have a substantial interest in the result.

Argument.

The Court of Appeals has determined that Section 124 of the New York Decedent Estate Law as applied in apportioning the Federal estate tax in this case among the persons interested in the estate, is in conflict with Section 826 (b) of the Internal Revenue Code and that because of the conflict, the application of the New York Statute must fail under Article VI, Clause 2, of the Constitution of the United States. This brief will be restricted to the outstanding question in this case, namely, the construction of the Federal statute. The State statute

can not be attacked on constitutional grounds unless the Federal statute is misconstrued by imputing to Congress an intention to prohibit an apportionment of the Federal estate tax by state legislation.

Construction of a statute consists of a search to find the meaning most probably intended by the Legislature. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 542; Hawkins' *Treatise on the Principles of Legal Interpretation* (Juridical Society Papers, ii 298); Thayer, *On Evidence*, p. 412.

In weighing the probabilities, the general likelihood or unlikelihood of a suggested meaning is important. In the present situation, it is definitely unlikely that Congress was interested in anything more than fixing the amount and assuring the collection of the tax. Certainly it is overwhelmingly improbable that Congress had any intention of entering the field of estate administration and distribution to the extent of supplanting or prohibiting State jurisdiction over such matters, for that is something that it had never done. In addition to these considerations there is the rule that if possible a Federal statute should be so construed as to avoid any suggestion of conflict with, and unconstitutionality of, a State statute.

The misconstruction which raises the controverted constitutional questions is arrived at by finding either an express prohibition in the phrase in Section 826 (b) of the Internal Revenue Code "so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before distribution" or an implied prohibition in the nature of the tax, which is an estate tax rather than an inheritance or succession tax. Properly construed, the statute authorizes, rather than prohibits, a State statute directing apportionment in the absence of a testamentary provision to the contrary.

If there had been no New York statute on the subject at all and the will had directed that the Federal estate tax should be apportioned, it would have been possible to attack the effectiveness of that direction on precisely the same grounds on which the effectiveness of Section 124 of the Decedent Estate Law has been attacked in this case. It could have been claimed that Congress intended that the tax should be paid out of the

residuary estate and that any attempt by a testator to provide otherwise was in conflict with the supreme law of the land and therefore ineffectual. The claim could have been supported by the same historical expositions of the nature of the tax and by the same hard worn and far stretched quotation from Section 826 (b) to the effect that the tax is to be paid before distribution. The briefs could have been just as long and just as learned as they have been in the case at bar. It is recognized by everybody that there would have been a short answer to all the language and all the learning. This answer would have been that Congress expressly authorized a testator to provide for an apportionment of the tax in his will. It did this in Section 826 (b) already quoted, when it said "so far as practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." It did it again in Section 812 (d) when it said that if the tax "either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or * * *" is payable out of a charitable gift which would otherwise be deductible, then the amount of the deduction shall be the amount of the gift reduced by the amount of the tax payable out of it.

The same provisions in the Federal statute are equally conclusive that Congress intended to authorize, rather than to prohibit, an apportionment of the tax by the combination of a State statute creating a presumptive apportionment and a will adopting the statutory apportionment by silence. The fact that Congress was willing that a testator should direct apportionment by his will proves that Congress saw nothing detrimental to its objectives in such a direction. If Congress had believed that the interests of the United States or the welfare of estate beneficiaries depended upon the payment of the tax out of the residuary estate, it would not have given testators permission to direct apportionment. The fact that Congress did give such permission is a complete answer to the involved line of reasoning whereby it is attempted to prove that Congress was concerned not alone with the imposition of an estate tax and the collection of it, but also with the way in which the burden of payment was to be distributed among

the beneficiaries of the estate. For if Congress was willing that testators should direct apportionment, it can not have been one of its objectives to assure payment out of the residue and by the residuary legatee. And if that was not one of its objectives, then there is no basis whatever for construing the Federal statute as prohibiting presumptive apportionment by State statute and there is every reason for construing it as providing for the computation and the collection of the tax, and nothing more.

This is really decisive of the case. If Congress had no interest in where the burden of the tax fell as between the various beneficiaries of the estate, then the statute can not be construed so as to prohibit a State statute containing a rebuttable direction for apportionment. But the logic of the situation goes further. It leads to the conclusion that, properly construed, the statute does not merely *fail to prohibit* apportionment by a combination of a State statute creating a presumptive apportionment and a will adopting the apportionment by silence, but *actually authorizes* such an apportionment. For the truth is that under such circumstances the direction for apportionment comes from the testator and the will, not from the legislature and the statute.

It is axiomatic that a will is drawn against the background of State law and that it contains not only what is within its four corners but also all the pertinent portions of the statute books and the decided cases. In *Matter of Bergdorf*, 206 N. Y. 306, 316, the Court, in referring to the rules with respect to executors laid down by the legislature, said that they "affect the testamentary disposition and provisions as though embodied in the will." See *Irving Trust Co.* v. *Day*, 314 U. S. 556.

In connection with various situations in which ambiguity, litigation and general dissatisfaction had frequently arisen, the legislature has intervened in aid of testators and testamentary beneficiaries by creating rebuttable presumptions with respect to the effect of certain testamentary provisions. One familiar example is Section 47 (a) of the Decedent Estate Law. The question whether in making a gift to "issue" a testator intends to make a gift *per capita* or *per stirpes*, was a mooted one which the legislature resolved by directing that if in equal

degree of consanguinity the issue should take *per capita*, but if in unequal degree, *per stirpes*, unless a contrary intention is expressed in the will. Similarly in connection with stock dividends, a presumption was created by Section 17 (a) of the New York Personal Property Law, which directs that "unless otherwise provided in the will" a stock dividend is principal.

Section 124 of the Decedent Estate Law says that unless a testator provides to the contrary, the estate tax shall be apportioned. The testator has the alternative of rebutting the statute or adopting it. Obviously the testator has the last word. If he rebuts it, everyone would admit that the direction for non-apportionment and some different source of payment is made by him. If he wants to adopt the statute there are two ways in which he may do it. He may adopt it in words, or he may adopt it by silence. If he adopts it in words, everyone would admit that it is the testator who directs the apportionment. If the testator adopts the statute by silence, it is equally true that it is he who directs the apportionment. The determination whether the direction by the testator is to be in express words or by silence rests almost entirely with the legal draftsman of the will. Some lawyers have a predilection for short wills and omit every provision which they deem unnecessary. Others prefer to insert express and positive directions even though they are not necessary. So far as the testator is concerned, it is all one to him. All that he knows is that he wants the estate tax apportioned and relies upon his lawyer to draft a will which will so direct. The important thing is that it is the testator who has the last word and by whose direction whether expressed by words or silence the apportionment is made.

To sum up: Congress must be presumed to have known that a State statute fixing the construction or effect of a will is a part of the will. Therefore, an Act of Congress expressly permitting an apportionment of the estate tax by will should be construed as authorizing either (1) an apportionment by express testamentary direction unaided by any State statute, (2) an apportionment by express testamentary adoption of a State statute directing apportionment in the absence of a con-

trary provision, or (3) an apportionment by a testamentary adoption of such a State statute implied from the silence of the will.

When this construction is given to the Federal statute, there can be no claim of conflict between Federal and State jurisdiction or of the unconstitutionality of Section 124 of the Decedent Estate Law.

Conclusion.

The decision of the Court of Appeals and the order of the Surrogate's Court entered on the remittitur of the Court of Appeals should be reversed.

Respectfully submitted,

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OCTOBER, 1942.

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ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Introductory.—Section 124 of the New York Decedent Estate Law (c. 709, Laws of 1930, see Appendix, *infra*, pp. 13–16) provides in effect that, except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by an executor shall be spread proportionately among the distributees or beneficiaries of the estate. The Court of Appeals of the State of New York, in a 4–3 decision (287 N. Y. 61, 38 N. E. (2d) 131), held that the state statute was unconstitutional in that it was in conflict with the federal estate tax law and in particular with Section 826 (b) of the Internal Revenue Code. (See Appendix, *infra*, pp. 12, 13.)

Of course, if there were any conflict between the state and federal statutes the former would have to give way. Cf. *United States* v. *Texas,* 314 U. S. 480; *United States* v. *Snyder,* 149 U. S. 210. We think, however, that there is no such conflict here, and in the circumstances we feel that it is appropriate to submit a brief statement of our views.

1. *The nature of the federal estate tax and Section 826* (b).—The federal estate tax was first enacted as part of the Revenue Act of 1916 (39 Stat. 756) and has been continuously in existence since that time. It was last reenacted as part of the Revenue Act of 1926 (44 Stat. 9), and thereafter, together with subsequent amendments, was incorporated in the Internal Revenue Code (53 Stat. 1).

Unlike the death taxes imposed by the federal government during the preceding century (see *Knowlton* v. *Moore,* 178 U. S. 41; *Scholey* v. *Rew,* 23 Wall. 331), the present tax is not an inheritance tax upon the receipt of property by the survivors, but is an estate tax upon the transmission of the entire net estate by the decedent. The rate is graduated according to the size of the net estate, which in turn is computed by subtracting from the gross estate such deductions as administration expenses, debts, etc. In theory, the tax is to be carved out of the estate prior to distribution, and the estate as thus reduced is then

ready for ultimate division among the survivors. See *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

Obviously, the collection of the tax reduces the amounts that would otherwise be distributed to the various survivors. The federal statute, however, does not undertake in any manner to specify how the estate, as thus reduced, shall be distributed. It contemplates simply that the tax will be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death will then determine how the remainder is to be distributed.[1] As was said by Cordell Hull, one of the proponents of the first estate tax in the House of Representatives (53 Cong. Rec. 10657):

> Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. * * *

Although the federal statute thus contemplated that the tax would be paid out of the estate before

[1] Normally, under the law of most states, the weight of the tax would be felt by the residuary legatee or devisee. *Corbin* v. *Townshend*, 92 Conn. 501, 103 Atl. 647; *People* v. *Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662; *Brown's Estate* v. *Hoge*, 198 Iowa 373, 199 N. W. 320; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265; *Amoskeag Trust Co.* v. *Trustees of Dartmouth College*, 89 N. H. 471, 200 Atl. 786. However, there might not be any residuary beneficiaries in some wills, or the residuary estate might be so small that the tax would have to cut into other legacies or bequests. But, whatever the situation, it is state law which governs the effect of the tax upon the various distributive shares.

distribution, it was recognized that distribution might actually be made in some cases before payment of the tax and that it was therefore necessary to authorize collection from any distributee.[2] However, out of fairness to any distributee that might thus be called upon to pay the tax, Section 826 (b) of the Internal Revenue Code provides that such person "shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate * * *." It seems evident from these provisions that Congress was simply attempting to protect a distributee against bearing a greater portion of the burden of the tax than he would otherwise have sustained had the tax been carved out of the estate prior to distribution. And any doubt on this question is removed by the final clause of Section 826 (b) which specifically states that it is "the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its dis-

[2] If the tax is not paid on or before the due date, the collector is authorized by Section 826 (a) of the Internal Revenue Code to proceed against the property of the decedent, and Section 827 (a) provides that the tax shall be a lien for ten years upon the gross estate of the decedent.

tribution."[3] In short, these provisions simply declare that the ultimate thrust of the tax shall be the same as though it had first been taken out of the estate, thus leaving to state law what that ultimate thrust shall be.[4]

Accordingly, we think that the provision of the New York statute which spreads the burden of the Federal tax proportionately among the distributees is in no way inconsistent with the Federal statute. Indeed, it was the purpose of the Federal statute not to become involved in the rights of the distributees *inter sese* but to leave that question to the decedent himself and to state law. See statement of Congressman Kitchin, 53 Cong. Rec., Appendix, part 15, p. 1942. Section 826 (b) merely underscores the state law by emphasizing that the rights of a distributee shall not be af-

[3] The court below appeared to treat the term "estate" as referring to the residuary estate. However, there is no warrant for thus departing from the plain language of the statute; the term "estate" should be read in the same way that it is used throughout the statute, as referring to all the property of the decedent, including the property used to pay specific and general legacies as well as residuary bequests. Such appeared to be the understanding of this Court in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50, 51.

[4] Further support for this conclusion is found in the provision giving the distributee a right of "reimbursement * * * by a just and equitable contribution." Presumably a "just and equitable contribution" would be the amount by which the contributor's share would have been reduced had the tax been paid prior to distribution. But the amount by which his share would have been reduced is by its very nature a question of state law.

fected by the fact that the tax has been collected from him in the first instance.

2. *Neither the legislative history nor the Treasury regulations with respect to Section 826 (b) show that Congress intended to prevent a state from fixing the ultimate burden of the tax among the survivors.*—(a) The provisions of Section 826 (b) originally appeared in substantially identical form as the third sentence of Section 208 of the Revenue Act of 1916, which read in full as follows:

> SEC. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out

of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

It will be observed that the first two sentences dealt with the collection of the tax by judicial proceedings against the decedent's property in cases where the tax had not been paid when due. Since Section 207 imposed upon the executor the duty of paying the tax on or before the due date, the first two sentences of Section 208 obviously contemplated the situation where the executor had failed to pay the tax and particularly where he had already made distribution. However, out of fairness to a distributee who might thus be called upon to pay the tax, the third sentence seeks to protect him against being left with a smaller portion of the decedent's estate than would have been the case had the tax first been paid out of the estate before distribution. But the statute does not undertake to dictate how the estate shall

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be distributed after the tax has been paid out of it.[5]

That Congress understood local law as governing the distribution of the estate after payment of taxes is confirmed by Section 812 (d) of the Internal Revenue Code. In spelling out the method of computing the deduction with respect to charitable bequests, etc., Section 812 (d) provides:[6]

> * * * If the tax imposed by section 810, or any estate, succession, legacy, or

---

[5] Only in the limited area occupied by Section 826 (c) has Congress undertaken to deal with the distribution of the burden of the estate tax among the survivors. Subsection (c) deals with life insurance receivable by a beneficiary other than the executor. The proceeds of such a policy in excess of $40,000 are included in the decedent's gross estate, although they do not pass through the executor's hands, and the beneficiary is required by subsection (c) to make a proportionate contribution towards the tax. The provisions embodied in (c) first appeared in Section 408 of the Revenue Act of 1918, 40 Stat. 1057, which for the first time specifically provided for the inclusion of life insurance proceeds in the decedent's gross estate (Section 402 (f)).

[6] These provisions were first enacted in Section 303 (c) of the Revenue Act of 1924 (43 Stat. 253) and were intended as a legislative reversal of *Edwards* v. *Slocum*, 264 U. S. 61. They were repealed about two years later by Section 323 (a) of the Revenue Act of 1926 (44 Stat. 9), but were subsequently restored to the estate tax law by Section 807 of the Revenue Act of 1932 (47 Stat. 169). The correctness of the dictum in the *Slocum* case (264 U. S. at 63) that the burden of the tax was to be determined by state law was, however, recognized by the amendatory provisions. The amendatory provisions are before the Court in *Harrison* v. *Northern Trust Co.*, No. 103, present Term, certiorari granted, October 12, 1942.

> inheritance taxes, are, either by the terms of the will, *by the law of the jurisdiction under which the estate is administered*, or by the law of the jurisdiction imposing the particular tax, *payable in whole or in part out of the bequests, legacies,* or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. * * * [Italics supplied.]

And the reports of the House and Senate Committees which considered these provisions expressly recognize that "local law" determines the ultimate impact of the estate tax. See H. Rep. No. 708, 72d Cong., 1st Sess., p. 49; S. Rep. No. 665, 72d Cong., 1st Sess., p. 52. See also Article 44 of Regulations 68 and Regulations 80; Section 81.44 of Regulations 105.

Although none of the committee reports specifically deal with the question here presented, such light as they do shed fails to disclose any intention to forbid a state from regulating the mode of distribution of the estate after payment of taxes.

(b) Nor do the Treasury regulations afford any support for the result reached by the New York Court of Appeals. Section 81.84 of Regulations 105 provides:

> SEC. 81.84 *Right to reimbursement.*—If any portion of the tax is paid by or col-

lected out of that part of the estate passing to, or in the possession of, any person other than the duly qualified executor or administrator, such person may be entitled to reimbursement, either out of the undistributed estate or by contribution from other beneficiaries whose shares or interests in the estate would have been reduced had the tax been paid before distribution of the estate, or whose shares or interests are subject either to an equal or prior liability for the payment of taxes, debts, or other charges against the estate. The executor is entitled to require beneficiaries under insurance policies to bear their proportion of the tax. These provisions, however, are not designed to curtail the right of the Commissioner to collect the tax from any person, or out of any property, liable therefor. The Commissioner cannot be required to apportion the tax among the persons liable, nor to enforce any right to reimbursement or contribution.

These provisions were first adopted in 1922 as Article 85 of Regulations 63, and have been continued without substantial change to the present time. Article 87, Regulations 68, Regulations 70 (1926 and 1929 eds.) and Regulations 80 (1934 and 1937 eds.). The importance of these regulations is negative in character, for the Treasury has consistently taken the position, at least since

1922,' that it had no interest in the distribution of the burden of the tax, except in the case of life insurance where the statute is explicit.

CONCLUSION

Section 826 (b) was designed merely to afford relief to a distributee who had been compelled to pay more than his fair share of the tax, measured by the amount that his portion of the estate would have been diminished had the tax been carved out of the estate prior to distribution. Congress did not intend to foreclose a state from regulating the distribution of the estate after the tax had been taken out. The provisions of Section 124 of the New York statute are not inconsistent with the federal estate tax law.

Respectfully submitted.

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OCTOBER 1942.

' The early regulations, prior to that time, were of a somewhat experimental character, and it is difficult to extract from them any uniform pattern. See Regulations 37 (1916 ed.), Articles 17 and 26; Regulations 37 (1917 ed.), Articles 31 and 37; Regulations 37 (1919 ed.), Articles 65 and 98.

APPENDIX

Internal Revenue Code, 53 Stat. 1:

SEC. 826. COLLECTION OF UNPAID TAX.

(a) SALE OF PROPERTY.—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection insofar as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) REIMBURSEMENT OUT OF ESTATE.—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose

interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) LIABILITY OF LIFE INSURANCE BENEFICIARIES.—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio. [U. S. C., Title 26, Sec. 826.]

Laws of New York (1930), c. 709:

§ 124. *Apportionment of federal and State estate taxes; executor or administrator to deduct taxes from distributive shares.*

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property re-

quired to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such

out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated insofar as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or

interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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No. 30.

Supreme Court of the United States

OCTOBER TERM 1942

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF OF GEORGE GRAY ZABRISKIE, COUNSEL FOR ARNOLD WOOD, JR., *AMICUS CURIAE*

GEORGE GRAY ZABRISKIE,
Counsel for Arnold Wood, Jr.,
Amicus Curiae.

October 5, 1942.

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BRIEF OF GEORGE GRAY ZABRISKIE, COUNSEL FOR ARNOLD WOOD, JR., *AMICUS CURIAE*

Statement

It may seem superfluous to add anything to the argument of petitioner's leading counsel, who stands at the head of the American Bar, in support of the constitutionality of Section 124 of the Decedent Estate Law, and his brief naturally calls for little by way of supplement. However, one state of facts will suggest emphasis on one aspect of the same general question of law while another will bring out more strongly a different aspect. At least one point stated but not greatly stressed in the petitioner's brief is well illustrated by the facts in *Matter of Wood*, 33 N. Y. Supp. (2d) 726, decided in January 1942, and not published in the official reports.

At the end of his opinion in that case, which is printed as an appendix to this brief, the Surrogate of Westchester County reserved the question of apportioning the Federal Estate tax until the instant case should be finally determined. If this Court holds that statute unconstitutional, the Federal Estate Tax alone will take $26,961.12 out of the $29,125 residuary estate; otherwise only $4,120.10. As the decision in the case at bar is thus of great concern to the residuary legatee and devisee in the *Wood* case, as well as of great public importance, the consent of counsel for the petitioner and for the respondents has been obtained to file this brief as *amicus curiae* in his behalf. The principal points argued in the petitioner's brief will not be restated here any further than necessary to connect them with whatever there is to say in addition.

Summary of Argument

The key to the meaning of Section 826 (b) of the Internal Revenue Code, against which Section 124 of the Decedent Estate Law is being tested, is the word "before" which appears twice in Section 826-(b). A fundamental error in the decision of the Court of Appeals is that the majority have construed Section 826 (b) as setting up priorities of rights or interests instead of dealing with priority in time.

In interpreting Section 826 (b) as inimical to the New York apportionment statute the Court of Appeals has given it a construction which is unreasonable, unauthorized and unjust. It is unreasonable because it is opposed to the sense of the matter. It is also unreasonable and unauthorized because it is opposed to the established principles of construction that unless the contrary clearly appears, a statute is presumptively intended to harmonize with existing law and facts, and, when reenacted, with intervening judicial, legislative and administrative interpretation. And it is unjust and unreasonable because it thwarts the testator's intent, the carrying out of which as far as possible

is a fundamental principle of all law having to do with estates. It is this last point that is particularly illustrated by the *Wood* case, where the court found that the testator wanted Arnold Wood, Jr. to have the residuary real estate or its proceeds, even though that meant abating the general legacies to a substantial extent.

FIRST POINT

There is no reason why Congress should have meant to fix the final incidence of the Federal Estate Tax; on the contrary, it must be credited with the intent to leave the matter to State Law.

1. The history and rationale of the statutes here involved are well set forth in the petitioner's brief and in Judge Desmond's dissenting opinion. A concise statement is found in *Matter of Ryle*, 170 Misc. 450, where the court said (pp. 452-3):

> "Procedural methods for determining the source of payment of estate taxes have been in the Internal Revenue Act since 1916. Substantially the same provision which now is section 314 of the Revenue Act of 1926 (U. S. Code, tit. 26, § 426) is to be found in the prior Internal Revenue Acts beginning with that of 1916. The statutory rule there declared was always subject to contrary direction by the will or instrument regulating the fund taxed. The Federal rule was a rule *against* proration unless the will or instrument otherwise directed. The current New York statute (Dec. Est. Law, § 124) is a rule *requiring* proration unless the will or instrument otherwise directs. The idea of proration is not novel. It has always been a matter of procedure rather than of substantive law.
>
> . . . . . .
>
> . . . While section 124 of the Decedent Estate Law was not operative on the date when this *inter vivos* trust of 1926 was created, the idea of statutory regulation of proration was already in the law by reason

> of article 10-B of the Tax Law. It was then accepted law that the burden of estate taxes was subject to state regulation. (*Edwards* v. *Slocum, supra*, decided 1923.) The acquiescence temporarily in the Federal rule did not disable this State to enact contrary legislation." • • •

2. The true intent of Section 826 (b) is best seen by transposing it and reading the last clause first, as in the complementary second paragraph of §124 of the Decedent Estate Law or as if it were a declaration of policy which nowadays so often precedes a statute. Section 826 (b) would then begin like this:

> It is the purpose and intent of this subchapter that so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution.

Primarily, this means exactly what it says. The plain purpose of the section is to get in the tax while the estate is intact in the executor's hands. It says to him, "First pay the tax, then distribute, unless that course is impracticable or the testator has otherwise ordered". There are many cases where it is a long and difficult task to value the estate and fix the tax, and in such cases, where the estate is clearly ample to pay all bequests, it is not reasonable or practicable to hold them all up and delay any distribution whatever until the amount of the tax is finally determined and paid. In those cases it is customary to make a partial distribution during the course of administration and withhold enough to take care of the taxes when they are finally determined. That has been done in the Wood estate. There are other instances where the will directs certain legacies to be paid immediately after the testator's death or the probate of the will. Mr. Wood so directed in his will with regard to three cash bequests and they were paid promptly after letters testamentary were issued. Secondarily, as shown

in petitioner's brief (pp. 35-38), this clause carries an implied instruction to the executor to distribute after paying the tax in accordance with the testator's directions or with the law of the jurisdiction.

With further explanatory paraphrasing and interpolation our transposed Section 826 (b) would continue somewhat as follows:

> If, however, the executor or administrator does not get possession of the whole taxable estate, or fails to withhold enough before distributing to cover the tax, so that the Government has to collect part or all of it from a legatee, the legatee shall be entitled to reimbursement by the executor or to "contribution by the persons whose interest in the estate of the decedent would have been reduced"—under the state law fixing its incidence—"if the tax had been paid before the distribution of the estate"—and not required to be apportioned thereafter—"or whose interest"—by the state law—"is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate".

The hypothesis that an executor might make a mistake as to the tax liability and in the amount he distributes is not fanciful. Many ways in which it might happen suggest themselves. It is one of the reasons why the practice in some states is to require refunding bonds (*Fitzpatrick's Estate*, 8 Pa. Dist. 726).

Unless Section 826 (b) is construed in this way it makes no sense. *Edwards* v. *Slocum*, 287 Fed. 651, 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, 264 U. S. 47, are sufficient authority for the proposition that it can make no difference to the United States whether the tax is chargeable proportionately to the various legatees or entirely to the residuary legatee, but that that is wholly a question of state law. The petitioner's brief makes this abundantly clear. Suppose, as the dissenting opinion and

the petitioner suggest (p. 36), there is no residue, or, as in the *Wood* case, that the residue consists wholly of real estate or its proceeds. Only the law of the state can say whose share shall be charged with the tax in such a case (*Irving Trust Co.* v. *Day*, 314 U. S. 556). Or suppose an executor reduces the estate to cash, pays the debts and administration expenses, ascertains the amount of the Federal estate tax and pays it, apportions it against the different legatees, pays each one his bequest less his proportionate share of the tax, and comes into court to have his account judicially settled. The Collector is not a party to be cited in such a proceeding. Would any court hold that he even had the right to intervene as a person interested in the estate and file objections to the account on the ground that the tax which he had received in full had subsequently been apportioned rather than all taken out of the residue? The question answers itself.

3. Section 826 (b) expressly authorizes the testator to apportion the tax himself by directing that each legatee shall bear his proportionate share. Or he could give a legatee, say $5,000 less an amount equal to his share of the total tax. If the testator is allowed to do this, the state of his domicile may undoubtedly annex to the privilege of making the will the condition that it may do the same thing, just as New York by Sections 17 and 18 of its Decedent Estate Law annexes the condition that charitable gifts in excess of half the estate, or other gifts beyond what the widow is entitled to claim, are so limited (*Irving Trust Co.* v. *Day, supra*).

SECOND POINT

The Court of Appeals has departed from established rules of statutory construction.

1. A fundamental principle of construction is that a statute is presumed to be intended to harmonize with existing law, both common and statutory, except so far as the contrary clearly appears either expressly or by necessary implication. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115; *Keck* v. *U. S.*, 172 U. S. 434, 446; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649. This and other principles of construction themselves constitute a national or federal common law on the subject (*Smith* v. *Alabama*, 124 U. S. 465, 478), though the common law by which the statute is tested is that of the States (*Erie R. R.* v. *Tompkins*, 304 U. S. 64).

A basic and universally accepted application of this rule is the principle just discussed, that the disposition, devolution, administration and distribution of estates are governed by the laws of the several states and not by Federal law (*Irving Trust Co.* v. *Day, supra; Mager* v. *Grima*, 8 How. 490).

2. Neither Congress nor the State legislatures function in a vacuum. When they pass a law they are presumed to know and give consideration to existing facts and circumstances to which it will apply. *State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177. There is no subject on which the leading members of the Committees who write the Revenue Acts are more certain to inform themselves than the laws and facts relative to New York estates, from which, according to the petitioner's brief (p. 7), a third of all Federal estate taxes are derived.

Thus when Congress re-enacted in Section 314(b) of the Revenue Act of 1924 what is now Section 826(b) of

the Revenue Code, which it carried over into all subsequent Acts, it knew that this Court in *Edwards* v. *Slocum*, 264 U. S. 61, and *Y. M. C. A.* v. *Davis*, id. 47, had declared that the law of the State nevertheless determined who should bear the tax, and Congress must be presumed to have adopted that interpretation of the statute. *Heald* v. *District of Columbia*, 254 U. S. 20; *Latimer* v. *U. S.*, 223 U. S. 501; *Bruce* v. *Tobin*, 245 U. S. 18, 20.

And when Congress carried forward the present section 826(b) in the Revenue Act of 1932, which was in effect when Mrs. Del Drago made her will, and in the 1936 Act which was in force when Mr. Wood made his, it also knew that the New York Legislature, in the light of those decisions and after most careful study by a commission of distinguished judges and lawyers, had determined by Section 124 of the Decedent Estate Law that unless a testator directed otherwise, the tax should be apportioned. That was a construction by the New York Legislature of Section 826(b) which under the circumstances is entitled to respect. Congress further knew, at least by 1936, that under that Statute many New York estates had been administered and closed and their taxes paid, apportioned and accepted without cavil by the Federal Government. In other words it knew that the Treasury had acquiesced in these interpretations of Section 826(b), which was equivalent to adopting them as its own practical construction, and that again is presumed to have taken into consideration by Congress in carrying forward Section 826(b) year after year. *Constanzo* v. *Tillinghast*, 287 U. S. 341; *Mass. Mutual Life Co.* v. *U. S.*, 288 U. S. 269; *U. S.* v. *Cerecedo Hermanos*, 209 U. S. 337; *National Lead Co.* v. *U. S.*, 252 U. S. 140.

3. Another long established rule of construction is that revenue laws are not to be extended by construction beyond the clear import of the language used or so as to

embrace or encroach on other matters. *Gould* v. *Gould*, 245 U. S. 151; *U. S.* v. *Merriam*, 263 U. S. 179; *Miller* v. *Nut Margarine Co.*, 284 U. S. 498. In recent years this principle has sometimes been extended but only in order to uphold social legislation; otherwise it still holds good. It is not perceived how the welfare of any group could be promoted by a decision that the question of who should be charged with the Federal estate tax was one for Congress rather than the states to decide.

THIRD POINT

The construction given to Section 826(b) by the Court of Appeals is unreasonable and unjust because it frustrates the intention of great numbers of testators. Unless reversed it will lead to countless claims for tax refunds and suits against residuary legatees.

1. There is no rule of law more faithfully and universally applied than the principle that a testator's intention is to be carried out unless it is not well expressed or conflicts with the policy of the state as expressed in statutes or decisions. This rule applies to the construction both of wills themselves and of laws affecting them.

Matter of Rahn, 316 Mo. 492, cert. denied, 274 U. S. 745;
Speer v. *Colbert*, 200 U. S. 130;
Hardenbergh v. *Ray*, 151 U. S. 112;
Jenkins v. *First National Bank*, 107 Fed. (2d) 764;
Corbett v. *Nutt*, 10 Wall. 464, 479;
Smith v. *Bell*, 6 Pet. 68;
Amherst College v. *Ritch*, 151 N. Y. 282;
Thomas v. *Trustees*, 70 Ohio St. 92;
McGlade's Appeal, 99 Pa. 338.

2. A testator is presumed to know the law of his state and to make his will accordingly; in particular

he is presumed to know whether or not under that law estate taxes will be paid from the residue.

Matter of Duryea, 277 N. Y. 310.

Specifically, before it occurred to the Court of Appeals that Section 124 was unconstitutional, that Court declined to review a decision that a testator who made his will before Section 124 was enacted but died after it took effect was presumed to have contemplated that the Federal estate tax would be apportioned.

Matter of Stanfield, 170 Misc. 447, aff'd 257 App. Div. 932, leave to appeal denied 281 N. Y. 887.

In the case at bar the prevailing opinion below says (287 N. Y., p. 79):

> "Deceased knew the law when she made her will, and then knew that in the absence of directions to the contrary in the will all federal estate taxes would be payable out of her residuary estate and that her net estate, after deduction of the federal tax, would alone be available for distribution to legatees and she thereby took into account any alleged inequities that might result in its application".

That statement is wholly unsound. The law she was presumed to know and intend to write into her will did not stop with the bare words of Section 826(b). It included the judicial, legislative and administrative construction that had been placed on that statute as stated in the preceding point. It is to be presumed that when the testatrix and Mr. Wood made their respective wills they were advised that by failing to provide expressly for the incidence of the tax they would cause it to be apportioned and save their respective residuary bequests from being cut down by more than their proportionate shares of the tax. Judge Desmond has well stated the matter at the end of his dissenting opinion:

> "Why should we strain to hold this statute unconstitutional, when in so holding, we produce a result

which the testatrix plainly did not intend? The will here, carefully drawn and disposing of a large estate, was made in 1934, four years after section 124 went into effect. Testatrix and her advisers are presumed to have known and must have known that, by the terms of section 124, she could, by inserting a few words in her will, forbid apportionment of the estate taxes and command their payment from the residue. She chose not to do so. We should not do it for her."

3. This intention is expressly shown in the Wood will. As the Surrogate in his opinion says:

> "Article First directs that all estate and inheritance taxes with respect to gifts therein specified be paid out of the residuary estate, but the will is silent as to the payment of estate taxes with respect to any other gifts contained in the will".

This should be interpreted as a direction that the taxes on all the other bequests were to be charged against them *pro rata*. *Expressio unius est exclusio alterius* applies in the construction of wills as elsewhere. *Matter of McClure*, 63 Hun 430, aff'd 136 N. Y. 238. However, in view of the rigid construction of Section 826(b) by the Court of Appeals, the Surrogate quite naturally did not go so far as to pro rate the tax until this Court should have passed upon this case.

4. But more than that, in the *Wood* case the Surrogate took proof of the facts bearing on the testator's intent. He found that though the testator did not leave enough property to pay all his bequests, and though his nephew and residuary legatee Arnold Wood, Jr. stood in about the same relationship to him as his other legatees, nevertheless the testator held this nephew in such high regard that he would have desired him to receive the proceeds of the residuary real estate rather than that they should be applied to the deficiencies in the prior legacies. As shown at the outset of this brief that intention, based

on the testator's paramount affection for this favorite nephew, will be almost wholly frustrated if the tax on the bequests to other relatives should be taken out of the residuary bequest. Under the principles above stated this Court will surely not construe Section 826(b) in such a way as to bring about so unjust and unreasonable a result.

Haggar Co. v. *Helvering*, 308 U. S. 389;
Burnet v. *Guggenheim*, 288 U. S. 280;
Farmers L. & T. Co. v. *Minnesota*, 280 U. S. 204, 212.

5. Besides upsetting the testamentary intentions of thousands of testators whose estate taxes have been apportioned and paid under Section 124, an affirmance of the decision of the Court of Appeals will have another unfortunate consequence that will not have escaped the attention of this Court. It will lead to thousands of claims and suits by legatees whose bequests have been charged with their proportionate shares of estate taxes to recover those amounts. Where the three-year Federal statute has not run most of such claims will naturally be made against the Government (*White* v. *Hopkins*, 51 Fed. (2d) 159). In other cases, legatees will take advantage of the longer state statute of limitations to bring suit for money had and received against residuary legatees who have long ago been paid and perhaps spent their bequests. (*Norfolk* v. *Norfolk Co.*, 120 Va. 379; *Mason* v. *Prendergast*, 120 N. Y. 536; *Stone* v. *White*, 301 U. S. 532.) This Court will surely not construe the law in a way that will allow such results to follow if they can possibly be avoided.

All of which is respectfully submitted,

GEORGE GRAY ZABRISKIE,
Counsel for Arnold Wood, Jr.,
Amicus Curiae.

October 5, 1942.

Appendix

Opinion of Surrogate Millard
(33 N. Y. Supp. (2d) 726)

Matter of William C. Wood, dec'd—In the within accounting proceeding, the reports of the special guardians and the report of the attorney representing a nephew of decedent now in the military service of the United States, contain certain objections to the account which make it necessary to construe the will of the above named testator.

The testator, William C. Wood, died on July 6, 1939, a resident of Westchester County. His last will and testament, dated July 1, 1937, was admitted to probate, and letters testamentary issued on July 22, 1939, to Arnold Wood, Jr., and the United States Trust Company of New York, the executors therein named.

Under Article "First" of the will, cash legacies of $1,000 each were given to a sister-in-law, niece and nephew of the testator. Specific bequests of personalty were also made thereunder to Arnold Wood, a brother, and to Ethel Hartshorne Wood, a sister-in-law of testator. Specific bequests and specific devises were also made under Article "First" to Arnold Wood, Jr., the aforesaid nephew of testator, and being one of the petitioners herein.

The closing language of Article "First" directs that the aforementioned cash legacies be a first charge upon the estate. It further directs that all estate and inheritance taxes which may be imposed upon all of the legacies and devises specified therein, be paid from the residuary estate without apportionment or contribution from the beneficiaries thereof.

Article "Second" bequeaths various sums of money to relatives, ffiends and employees. Article "Third" devises an undivided interest in certain real estate to Arnold Wood, a brother, and Article "Fourth" devises other real estate to Gilbert Congdon Wood, Jr., a nephew of the testator.

Article "Fifth", creates three trusts of $25,000.00, $50,000.00 and $75,000.00, being respectively designated as subdivisions (a), (b) and (c) thereof. As to the $25,000 trust first hereinabove mentioned, the will directs that upon the termination of the life estate the principal "be and become a part of my said residuary estate to be distributed as provided in article Sixth hereof." Article "Sixth" reads as follows: "Sixth. All the rest, residue and remainder of my estate, real and personal, including any of the foregoing legacies which may lapse or fail to vest, herein referred to as my residuary estate, I bequeath and devise to my nephew said Arnold Wood, Jr., his heirs and assigns absolutely forever." Article "Eighth," subdivision (a) contains a power of sale in the following language: "Eighth (a) To hold any of the real estate left by me (other than the real estate devised by articles First, Third and Fourth of this my will) for such a period as they may deem wise not exceeding five years from the time of my decease, and to sell, mortgage and lease the same upon such terms as they may deem advisable."

Pursuant to said power of sale the executors have sold all real estate not specifically devised and there has been realized upon said sale the sum of $29,125.00.

Both objectants to the account have asked that the will be construed as follows:

(1) That the proceeds of the sale of real estate not specifically devised should be applied to the payment of

the legacies and trusts contained in Articles "Second" and "Fifth."

(2) That upon the termination of the trust in the principal sum of $25,000 created under subdivision (a) of Article "Fifth," the corpus thereof shall be applied to the payment of the legacies contained in Article "Second" and to the augumentation of the two other trusts contained in Article "Fifth."

(3) That all legatees and devisees bear their proportionate share of the estate taxes.

The testimony offered at a hearing held herein discloses that the testator and Arnold Wood, Jr., were very friendly, each visiting the other frequently. The fact that the testator appointed him an executor and trustee indicates that he held his said nephew in high regard. There was, however, no testimony produced establishing the relationship similar to that of parent and child between the testator and his said nephew. While the testimony of the draftsman of the will discloses certain declarations made by the testator at or about the time the will was executed, no evidence was produced establishing either the actual amount of the testator's estate at the time of the execution of the will or the proportion thereof of personalty and realty. However, the testator, at the time of the execution of the will, stated to the draftsman thereof that he expected to leave an estate of about $400,000. Moreover, the testimony does not disclose the date of acquisition of the real estate not specifically devised. The testimony, it may be said, fairly establishes that the testator, at the time of the execution of the will, was a man of about 72 years of age, quite active, and who personally handled his business affairs. The accounting herein indicates that the gross estate approximates $280,000 and that the net estate, after

distribution to legatees to the extent of $20,150.71 amounts to $203,800.99, subject to deduction of commissions and expenses of accounting. Included in the assets accounted for is the sum of $29,125 realized upon liquidation of two parcels of realty not specifically devised by the testator. Since the general legacies and trusts payable on death of the testator amounted to $269,000, the assets of the within estate will be insufficient for the payment in full of all gifts.

The general rule is that real estate is not charged with the payment of legacies, as a matter of course (Bevan v. Cooper, 72 N. Y. 317; Matter of Lilienthal, 139 Misc. 225, and authorities cited). The language of the will must be scrutinized carefully and the intent of the testator must be drawn therefrom in the light, however, of the circumstances surrounding the testator at the time of the execution thereof (Bevan v. Cooper, supra; Ely v. Megie, 219 N. Y. 112, and cases cited). Some of the factors to be considered as indicating an intention to charge realty were summarized in Matter of Lilienthal (supra) as follows: The knowledge of the testator at the time of the execution of the will of a deficiency in his personalty as compared with the legacies given by his will; the presence in the will of a direction that transfer taxes on the general legacies should be paid from the residue; the granting of a power of sale; the fact that general legatees were more the natural objects of testator's bounty than those named in the residuary clause; and, the blending of realty and personalty in the residuary clause.

Article "First" directs that all estate and inheritance taxes with respect to gifts therein specified be paid out of the residuary estate, but, the will is silent as to the payment of estate taxes with respect to any other gifts con-

tained in the will. The testimony discloses nothing to indicate that the testator knew or considered, at the time of the execution of the will, that there was a deficiency in his personalty as compared with the legacies given by his will. It is contended, however, that the power of sale contained in Article "Eighth" of the will evidenced an intention to charge said legacies and trusts upon the realty. Without exhaustively discussing the presence of a power of sale appearing in a will as indicating an intention to charge general legacies upon realty not specifically devised, it may be said that such incidence is not in itself conclusive. The relationship between the testator and the beneficiaries is an important consideration (Matter of Mould, 117 Misc., 1, aff'd 204 A. D., 889, aff'd 236 N. Y., 582, and cases cited). While it appears that said Arnold Wood, Jr., and most of the other legatees stood in about the same degree of relationship to the testator, certainly none of them was more the natural object of testator's bounty than his nephew Arnold Wood, Jr.

The blending of realty and personalty in the residuary clause is of relative unimportance in determining whether or not legacies ought to be charged on real estate passing under the residuary clause in a will (Matter of Lilienthal, supra).

From the language of the will read in the light of extrinsic circumstances surrounding the testator at the time of the execution thereof, I determine that the proper construction of the will in the case at bar precludes charging the general legacies upon real estate not specifically devised. It follows therefore that Arnold Wood, Jr., the residuary devisee, is entitled to the proceeds of the sale of such real estate.

Appendix

The general principle that a gift of a trust remainder to the residuary estate cannot become effective until all prior donations made by the will have been paid in full has been enunciated in Matter of Title Guarantee & Trust Company (195 N. Y., 339). Following the authority of said case, I hold that upon the termination of the trust set forth in subdivision (a) of article "Fifth" of the will, the corpus thereof must be applied to the full payments of the legacies contained in article "Second" and the trusts contained in subdivisions (b) and (c) of article "Fifth" before such corpus or any part thereof, shall pass into the residuary estate.

All State and Federal estate taxes imposed upon or in connection with the three $1,000 legacies set forth in article "First" must be paid from the residuary estate in conformance with the express language of the will.

As to all other gifts, the State estate tax will be borne by the persons interested in the estate, as provided by section 124 of the Decedent Estate Law. In view of the decision of the Court of Appeals in Matter of Del Drago, (287 N. Y., 61), holding said section unconstitutional in so far as it directs apportionment of the Federal estate taxes among the persons interested in the estate, the executors herein are directed to retain such reserve fund as is sufficient to cover the Federal estate taxes payable, pending final determination of such decision of the Court of Appeals. Final distribution thereof will be made by supplemental decree in this proceeding upon the application of any interested party, in accordance with such final determination in the Del Drago case.

Settle decree accordingly.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL' DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR. as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF OF MARY ANN BLUMENTHAL, *AMICUS CURIAE*

BETHUEL M. WEBSTER,
Attorney for Mary Ann Blumenthal, Amicus Curiae

FREDERICK SHEFFIELD,
ROBERT P. LYNN,
Of Counsel

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One effect of apportioning the Federal Estate Tax under Section 124 of the New York Decedent Estate Law would be a decrease in the amount of such tax on all New York estates in which charities share in the residue. (Discussed in Respondents' brief, pp. 31-33, and in Petitioner's brief, p. 15, footnote, and p. 46.)

Under Sec. 812(d) of the Internal Revenue Code, the deduction from the gross estate for any charitable legacy is limited to the amount of such legacy as reduced by taxes thereon. Under Section 124, the Federal Estate Tax would be apportioned, thus increasing the net residuary estate, the amount of all charitable residuary legacies, and, con-

sequently, the charitable deductions from the gross estate for Federal taxation purposes.

This is the situation in the Estate of George Blumenthal,* now in process of administration in New York County, New York.

Statement

Under the provisions of the will of the late George Blumenthal, charitable institutions shared in the residuary estate to the extent of approximately one-quarter thereof.

The Federal Estate Tax return of the Blumenthal Estate was filed September 25, 1942. No final determination has, of course, been made of the ultimate Federal Estate Tax liability of this Estate. Many very complex questions must be resolved before the same is possible. However, on the basis of the return as filed, a Federal Estate Tax in the amount of $2,210,105.47 was paid. Using the same bases as those used in this return for comparison purposes, but computing the tax as though Section 124 of the New York Decedent Estate Law was and had been valid, the Estate would have paid a total Federal Estate Tax of only $2,135,345.33.

The reduction in Federal Estate Tax, based on the foregoing comparison, resulting from a reversal of the case at bar would therefore be $74,760.14. The difference would be even more marked if charities had a larger interest in the residue.

Legacies were left under the will of the late George Blumenthal to substantially all of the testator's personal

* Decree admitting will to probate and letters testamentary issued by the Surrogate's Court of the County of New York on September 13, 1941.

and domestic employees, to several of his friends and relatives, to charities, and to his surviving widow, Mary Ann Blumenthal (*amicus curiae* here), who also shared in the residuary estate. All of such legatees are interested in having the case at bar affirmed, since on the basis of the return as filed, general legacies are paid to the extent of approximately 89% of the amounts named in the will, while on the other basis (applying the formula of Section 124 to the return as filed), they are reduced to approximately 54% of such amounts.

Argument

A decrease in Federal Estate Tax of any amount such as $74,760.14 shows a real "interference" and "conflict" between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law. A substantial loss of revenue is involved.

In the presence of such facts it follows that the Federal Government is interested in the incidence of the burden of the Federal Estate Tax, if the determination thereof by a State statute in the absence of any expressed testamentary intent on this matter may decrease such Tax. An express or implied surrender to state authority to determine the amount of the Federal Estate Tax is not apparent in the Federal Estate Tax Law. (Respondents' brief, in addition to arguing this point on pages 31 to 33, gives strength to this position by the presentation of the background of Congressional purpose behind the Federal Law on pages 10 to 31.) Thus, it must be presumed that state legislation which alters the amount of a Federal tax is repugnant to the Federal Estate Tax Law and to the supremacy and uniformity clauses of the Constitution of the United States.

Conclusion

The order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York entered upon remittitur of the Court of Appeals in the case before the Court should be affirmed.

October 16, 1942.

Respectfully submitted,

BETHUEL M. WEBSTER,
Attorney for Mary Ann Blumenthal, Amicus Curiae

FREDERICK SHEFFIELD,
ROBERT P. LYNN,
Of Counsel

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1942.

Lawrason Riggs, Jr., Special Guardian, Petitioner, *vs.* Giovanni del Drago, Marcel del Drago, Byron Clark, Jr., as Executor, et al. } On Writ of Certiorari to the Surrogate's Court of New York County, State of New York.

[November 9, 1942]

Mr. Justice Murphy delivered the opinion of the Court.

The question for decision is whether § 124 of the New York Decedent Estate Law,[1] which provides in effect that, except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate, is unconstitutional because in conflict with the federal estate tax law, Internal Revenue Code, § 800 *et seq.*

Testatrix, a resident of New York, died on October 8, 1937, leaving a will dated March 27, 1934, which, after certain gifts of personal effects and small sums of cash, bequeathed $300,000 outright to respondent Giovanni del Drago and created a trust of $200,000 for the benefit of respondent Marcel del Drago during his life, with remainder over upon his death. The residue of testatrix's estate was left in trust for the benefit of Giovanni during his life with remainder over upon his death. The will contained no reference to the payment of estate or inheritance taxes.

The executors paid approximately $230,000 on account of the federal estate tax and then asked the Surrogate, in a petition for the settlement of their account, to determine whether that payment should be equitably apportioned among all the persons beneficially interested in the estate pursuant to § 124 of the Decedent Estate Law. Giovanni and Marcel del Drago answered, raising objections to the constitutionality of § 124. Petitioner, who was appointed special guardian to represent the interests of the infant remaindermen under the residuary trust, urged that

[1] Chapter 709, Laws of 1930.

the tax be apportioned. The Surrogate overruled the constitutional objections and directed apportionment.[2] The New York Court of Appeals by a divided court reversed, holding § 124 repugnant to the federal estate tax law—particularly to § 826(b) of the Internal Revenue Code—and in violation of the supremacy (Art. VI, cl. 2) and the uniformity (Art. I, Sec. 8, cl. 1) clauses of the Constitution.[3] The importance of the question moved us to grant certiorari.

We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; accordingly, § 124 is not in conflict with the federal estate tax law. This conclusion is based upon the provisions of the Revenue Act of 1916, 39 Stat. 756, and subsequent acts, their legislative history and their administrative interpretation.

In the Act of 1916 Congress turned from the previous century's inheritance tax upon the receipt of property by survivors (see *Knowlton* v. *Moore*, 178 U. S. 41; *Scholey* v. *Rew*, 23 Wall. 331) to an estate tax upon the transmission of a statutory "net estate" by a decedent. That act directed payment by the executor in the first instance, § 207, but provided also for payment in the event that he failed to pay, § 208. It did not undertake in any manner to specify who was to bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congress intended that state law should determine the ultimate thrust of the tax.[4] That Congress from 1916 onward has understood local law as

[2] 175 Misc. (N. Y.) 489, 23 N. Y. S. 2d 943.

[3] 287 N. Y. 61, 38 N. E. 2d 131.

[4] Congressman Cordell Hull, one of the supporters of the 1916 Act and its reputed draftsman, declared: "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." 53 Cong. Rec. 10657.

Congressman Kitchin, Chairman of the House Ways and Means Committee, stated: "We levy an entirely different system of inheritance tax. We levy the tax on the transfer of the flat or whole net estate. We do not follow the

governing the distribution of the estate after payment of the tax (with the limited exceptions created by § 826(c) and (d) of the Internal Revenue Code, to be discussed presently) is confirmed by § 812(d) of the Code, dealing with charitable deductions, which recognizes that estate taxes may be payable in whole or in part out of certain bequests, etc., "by the law of the jurisdiction under which the estate is administered".[5] The administrative interpretation has been in accord.[6] and that has been the understanding of the federal courts,[7] and of some state courts.[8]

In reaching a contrary result, the court below relied primarily upon § 826(b).[9] But that section does not direct how the estate is to be distributed, nor does it determine who shall bear the ultimate burden of the tax. As pointed out before, while the federal statute normally contemplates payment of the tax before

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beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution." 53 Cong. Rec. app. p. 1942.

[5] Section 812(d) was first enacted as § 303(a) of the 1924 Act, 43 Stat. 253. It was repealed by § 323(a) of the 1926 Act, 44 Stat. 9, and reenacted by § 807 of the 1932 Act, 47 Stat. 169. The committee reports accompanying the 1932 Act recognize that local law determines the ultimate incidence of the federal estate tax. H. Rep. No. 708, 72d Cong., 1st Sess., p. 49; S. Rep. No. 665, 72d Cong., 1st Sess., p. 52. See also Article 44 of Regulations 68 and Regulations 80; Section 81.84 of Regulations 105.

[6] The Treasury has taken the position, at least since 1922, that it has no interest in the distribution of the burden of the estate tax. See Article 85 of Regulations 63; Article 87 of Regulations 68, Regulations 70 (1926 and 1929 eds.), and Regulations 80 (1934 and 1937 eds.); and, Section 81.84 of Regulations 105.

[7] Edwards v. Slocum, 287 F. 651, 653, affirmed, 264 U. S. 61; 63; Y. M. C. A. v. Davis, 264 U. S. 47, 51; New York Trust Co. v. Eisner, 256 U. S. 345, 349; Hepburn v. Winthrop, 83 F. 2d 566, 572.

[8] Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N. H. 471, 200 A. 786; Thompson v. Union Mercantile Trust Co., 164 Ark. 411, 262 S. W. 324; Henderson v. Usher, 125 Fla. 709, 170 So. 846. And see In re Newton's Estate, 74 Pa. Super. Ct. 361; Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265; Corbin v. Townshend, 92 Conn. 501, 103 A. 647; Gaede v. Carroll, 114 N. J. Eq. 524, 169 A. 172.

But compare Matter of Hamlin, 226 N. Y. 407, 124 N. E. 4; Farmers Loan & Trust Co. v. Winthrop, 238 N. Y. 488, 144 N. E. 769; Matter of Oakes, 248 N. Y. 280, 162 N. E. 79; Bemis v. Converse, 246 Mass. 131, 140 N. E. 686.

[9] This section was originally enacted as part of § 208 of the Act of 1916. Its full text is as follows:

SEC. 826. COLLECTION OF UNPAID TAX.

. . . . . .

(b) *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession

the estate is distributed, § 822(b) of the Code, provision is made for collection of the tax if distribution should precede payment. § 826(a). If any distributee is thus called upon to pay the tax, § 826(b) provides that such person "shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate". By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section specifically stating that it is "the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.". Section 826(b) does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase "the tax shall be paid out of the estate" as meaning "the tax shall be paid out of the *residuary* estate" is to distort the plain language of the section and to create an obvious fallacy. For in some estates there may be no residue or else one too small to satisfy the tax; resort must then be had to state law to determine whether personalty or realty, or general, demonstrative or special legacies abate first. In short, § 826(b), especially when cast in the background of Congressional intent discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

Respondents also rely on § 826(c),[10] authorizing the executor to collect the proportionate share of the tax from the beneficiary

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of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

[10] This section was first adopted in § 408 of the 1918 Act, 40 Stat. 1057. See H. Rep. No. 767, 65th Cong., 2d Sess.

of life insurance includable in the gross estate by reason of § 811(g), and § 826(d),[11] authorizing similar action against a person receiving property subject to a power which is taxable under § 811(f), as forbidding further apportionment by force of state law against other distributees.[12] But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor.

Since § 124 of the New York Decedent Estate Law is not in conflict with the federal estate tax statute, it does not contravene the supremacy clause of the Constitution. Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity. Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 602.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[11] This section was added by § 403(c) of the Revenue Act of 1942, approved October 21, 1942. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 161.

[12] This argument was accepted in Bemis v. Converse, 246 Mass. 131, 140. N. E. 686, and Farmers Loan & Trust Co. v. Winthrop, 238 N. Y. 488, 144 N. E. 769.